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REPORTS OF CASES
DECIDED IN THE
APPELLATE COURTS
OF THE
STATE OF ILLINOIS
AT THE
MARCH AND OCTOBER TERMS, 1898, OF THE FIRST DISTRICT, AND THE
NOVEMBER TERM, 1898, OF THE THIRD DISTRICT.

WITH A
TABLE OF CASES REVIEWED BY THE SUPREME COURT

VOL. LXXX

REPORTED BY
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COUNSELOR AT LAW

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CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—MARCH TERM, 1898.

**John Gubbins v. Equitable Trust Co., Assignee of the
Excelsior Machine & Boiler Works et al.**

1. **LANDLORD'S LIEN**—*Where the Tenant Makes a Voluntary Assignment.*—A landlord has no lien upon the assets of an insolvent tenant, in the hands of an assignee under the insolvent act, in preference to other creditors, by virtue of provisions of his lease granting him a first lien upon the property belonging to his tenant, as security for the payment of the rent.

2. **SAME**—*Under the Provisions of a Lease.*—A provision in a lease giving a landlord a first lien upon the goods of his tenant, and the right to distrain the same, whether or not exempt by law, as to creditors, is in the nature of a chattel mortgage lien, and is to be governed by the rules of law applicable to chattel mortgages.

Voluntary Assignment Proceedings.—In the County Court of Cook County; the Hon. JOHN H. BATTEN, Judge, presiding. Finding and judgment for defendants. Appeal by petitioner. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed January 24, 1899.

STEIN & PLATT, attorneys for appellant.

FEISENTHAL & D'ANCONA, JEROME PROBST and ROBERT VAN SANDS, attorneys for appellees.

MR. JUSTICE SHEPARD delivered the opinion of the court. Appellee Trust Company is the assignee of the Excelsior Machine & Boiler Works, an insolvent corporation, by deed of assignment executed and filed December 28, 1896; the other

appellees were creditors of the insolvent, who were made parties defendant to the petition of appellant concerning which the order appealed from was made.

Appellant filed his petition, February 15, 1897, in the County Court, setting up that the insolvent continuously occupied, as his tenant, certain premises in Chicago, from August 1, 1892, to the time of the assignment, and that after that time the assignee had been in possession of the same; that the insolvent went into possession under a written lease reserving an annual rent of \$1,800, payable monthly in advance installments of \$150 each, and that said sum is a fair and reasonable rent of the premises so occupied; that said lease was for a term of one year, expiring July 31, 1893; that there is due to appellant an unpaid balance of \$5,175 for rent accrued under said lease, and that it was expressly provided in and by said lease that appellant should "have a valid first lien upon any and all goods and chattels and other property belonging to said Excelsior Machine & Boiler Works as security for the payment of the said rent as the same should become due."

The object of the petition was to establish in appellant's favor a preferred lien, to the extent of the accrued and unpaid rent, upon the property of the insolvent which came to the hands of the assignee, and to require the assignee to pay the same. The petition was filed while the assignee had possession and control of all the personal property of the insolvent estate, and by agreement of parties the property was sold free from appellant's claim, and his lien, if any, was transferred to the proceeds, to the extent of \$1,971.60, if his lien were established, which amount was found by the court to have been realized by the assignee's sale of chattels belonging to the insolvent at the time the lease was executed.

The petition was answered by the appellees, and upon a hearing the County Court found that appellant was not entitled to a lien upon any of the assets in the assignee's possession, and disallowed his petition.

The clause of the lease upon which appellant rests his claim to a lien is as follows:

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“ It is expressly understood and agreed by and between the parties aforesaid, that if the rent above reserved, or any part thereof, shall be behind or unpaid on the day of payment whereon the same ought to be paid, as aforesaid, or if default shall be made in any of the covenants and agreements herein contained to be kept by the said party of the second part, its successors and assigns, it shall and may be lawful for the said party of the first part, his heirs, executors, administrators, agent, attorney or assigns, at his election, to declare said term ended, and into the said premises, or any part thereof, either with or without process of law, to re-enter; and the said party of the second part, or any other person or persons occupying, in or upon the same, to expel, remove and put out, using such force as may be necessary in so doing, and the said premises again to repossess and enjoy as in his first and former estate, and to distrain for any rent that may be due thereon upon any property belonging to said party of the second part, whether the same be exempt from execution and distress by law or not; and the said party of the second part in that case hereby agrees to waive all legal rights which it now has or may have to hold or retain any such property, under any exemption laws now in force in this State, or in any other way, meaning and intending hereby to give to the said party of the first part, his heirs, executors, administrators or assigns, a valid and first lien upon any and all goods and chattels and other property belonging to the said party of the second part, as security for the payment of said rent in manner aforesaid, anything hereinbefore contained to the contrary notwithstanding.”

The lease is executed by John Gubbins, party of the first part, and by Excelsior Machine & Boiler Works, by John Gubbins, president, and L. Oberndorf, secretary.

There was never any written extension of the lease; the case was simply one of a holding over by the tenant from one year to another without any new agreement, and it was admitted on the record that the rent claimed to be due accrued subsequent to July 31, 1893, the expiration of the term provided in the lease.

Although appellant was lessor, as well as president of the lessee corporation, no point is made as to the validity of the lease.

The appellant admits that he has no case if Packard v.

C. T. & T. Co., 67 Ill. App. 598, and Bank v. Baker, 62 Ill. App. 154, were correctly decided, but attempts to show that such decisions "are in direct contradiction to a long line of decisions" by the Supreme Court. The Baker case was the authority for the decision of the Packard case, and decided that a chattel mortgage, which is invalid as to third persons, because not acknowledged and recorded pursuant to the statute, though good as between the parties to it, is not effectual as against an assignee for the benefit of creditors who, before any action by the mortgagee, has taken the mortgaged chattels into his possession and control under his deed of assignment.

The lien claimed by appellant by virtue of the quoted provisions of the lease is in the nature of a chattel mortgage lien, and is to be governed by the rules of law applicable to chattel mortgages. Borden v. Croak, 131 Ill. 68.

Although the general proposition is that an assignee in insolvency for the benefit of creditors, stands only in the place of the assignor as respects the property of the latter, it would be anomalous if in the case of a chattel mortgage invalid as to creditors, it should be held to be valid as against the assignee who is a trustee for the creditors.

As illustrated in the New York Court of Appeals decision, referred to in the Baker case, if the assignee takes no title against the mortgagee in such a case, it would follow that a creditor might, after the assignment, obtain judgment, have execution issued, and thus acquire a lien superior to both that of the mortgagee and assignee.

We have examined all the authorities cited by the appellant, and see no reason for receding from the Packard and Baker decisions, but it would take too much time and space to review them in detail. There are other grounds for affirming the judgment, but the appellant having staked his case upon the erroneous decision of those cases, as he claims, we will not take up propositions that he has not argued and give further reasons for affirming the judgment. Affirmed.

Harz v. Peterson.

C. O. Harz v. Louis Peterson.

1. **CONSTRUCTION OF CONTRACTS—*Unreasonable Advantages.***—A contract should never be construed so as to give one party an unfair or an unreasonable advantage over another, unless such was the manifest intention of the parties at the time it was made.

2. **SAME—*Mutuality and Justice Between the Parties.***—It is one of the cherished objects of the law to maintain a reciprocity between the parties to contracts, whenever it can be done without doing violence to the language used.

3. **SAME—*Must Have Mutuality.***—A contract must have mutuality to it, and a construction which works a hardship ought not to be adopted unless the contract will bear no other.

4. **INSTRUCTIONS—*Not to Submit the Construction of a Contract to the Jury—Technical Words and Terms of Art or Science.***—An instruction which submits to the jury the interpretation of a contract is erroneous; it is for the court alone to construe written contracts, except where technical words, or terms of art or science are used.

Assumpsit, on a contract for wages. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1898. Affirmed. Opinion filed January 24, 1899.

GURLEY & WOOD, attorneys for appellant.

MORSE, IVES & TONE, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The appellee agreed to work as a driver of livery carriages for the appellant, a livery stable keeper, for wages to be fixed from time to time. The testimony showed the wages were to be \$25 for the first month, and \$30 per month thereafter. Among the agreements made by appellee were the ones in controversy, viz.:

“6th. First party (appellee) agrees that he shall be held responsible to second party for everything entrusted to his care and will respond in damages to the value of the damage to any vehicle or other property of the second party while in his care, and second party shall have the right to deduct from the wages due or to become due to first party the amount of all such damages.

It is further agreed by first party that he will hold second party harmless from any damage done by first party to any other person through first party's fault, carelessness or negligence; and in case second party shall be compelled to respond in damages to any person so damaged by the fault, carelessness or negligence of first party, second party shall have the right to deduct from the wages due or to become due to first party the amount of such payment."

Appellee worked from December 23, 1896, to April 5, 1897, a period of three months and twelve days, when he quit work, as by the terms of the contract he might rightfully do. He brought suit for the wages due him, and recovered judgment for \$37.

This amount was exactly right, as we figure, charging appellee with payments made to him, and for the number of days he was absent as shown by appellant's book, if appellee be excused from liability for damages, under the contract stipulations above quoted.

The damages claimed by appellant to have been caused by the appellee, occurred by the running away of a team and carriage in the temporary care of the appellee.

There was no agreement by appellant to furnish reasonably safe horses, carriage or harness for appellee to drive. It was appellee's duty to take such of them as he was ordered to take, and to drive where he was bidden.

An instruction was asked by appellant which, in effect, announced to the jury, as a matter of law, that appellee was an insurer of the safety of all property entrusted to his care, and the court refused to give it. Such requested instruction was based upon the first paragraph of the quoted part of the writing signed by appellee. Presumably the trial judge considered the agreement, in that respect, as lacking in mutuality, and as unreasonable and oppressive. To hold appellee absolutely responsible to the extent of the total damage to property intrusted to his driving, without reference to his fault, would, under the circumstances of his employment, be harsh and oppressive in the extreme. In view of the amount of his wages and of his lack of right to select or choose what he should drive, it is quite improb-

able that it was intended he should be held liable for the total value of horses, carriage and equipment, amounting to, perhaps, a thousand dollars or more, every time he drove out. In the construction of contracts a court will, whenever the terms of a contract admit of it, lean to what is beneficial, mutual and just as between the parties. Bishop on Contracts, Sec. 417.

“We should never so construe a contract as to give one party an unfair or an unreasonable advantage over another, unless such was the manifest intention of the parties at the time it was made. * * * It is one of the cherished objects of the law to maintain a reciprocity between the parties to contracts, whenever that can be done without doing violence to the language used.” Gale v. Dean, 20 Ill. 320.

The obligation should be mutual or reciprocal; it should not be by one party only. County Commissioners v. Jones, Breese, 237.

A contract must have mutuality to it, and a construction that would work a great hardship ought not to be adopted unless the contract will bear no other. Bangor Furnace Co. v. Magill, 108 Ill. 661.

We think the instruction was properly refused upon the grounds spoken of.

But there is another objection to the instruction. It submits to the jury the interpretation of the contract. Courts alone may interpret or construe written contracts, except when technical words or terms of art or science are used. Streeter v. Streeter, 43 Ill. 155; Sigsworth v. McIntyre, 18 Ill. 126.

The contract, without any instruction as to its meaning, was before the jury, together with all the evidence, conflicting upon the question of whether the appellee was careless or at fault in the care and management of the team, and their verdict must be regarded as having settled every question of fact that was in controversy.

The judgment will be affirmed.

**Rudolph H. Garrigue v. David Arnott, Receiver of the
Woolley Magnetic Engine Co.**

1. *RES ADJUDICATA*—*As to Persons Not Subject to the Jurisdiction of the Court.*—The adjudications of a matter in a suit in which a person is named as a party, but of whose person the court acquires no jurisdiction by service of process or otherwise, can not be considered as *res adjudicata* as to such person.

2. *STOCKHOLDERS*—*Defenses in Suits on Subscriptions.*—In an action brought by a receiver under an order of court, in the name of the corporation he represents, to recover sums claimed to be due from delinquent stockholders, a defendant has the right to avail himself of any defense going to show that he is not liable upon his contract of subscription.

Assumpsit, on a subscription to stock. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1898. Reversed and remanded. Opinion filed January 24, 1899.

STATEMENT.

This is an appeal from a judgment of the Superior Court of Cook County, against appellant, in a suit wherein David Arnott, appellee, as receiver of a Michigan corporation, sought to recover from appellant upon an alleged subscription to the capital stock of such corporation.

Appellee was appointed receiver of the Woolley Magnetic Engine Company by the Circuit Court of Kent County, Michigan, in a suit wherein William R. Fox was complainant and the company and Marcus F. and Marcus W. Bates were defendants. The bill filed in the Michigan court is in the nature of a judgment creditor's bill, based upon a judgment recovered by complainant against said company September 13, 1889, in the sum of \$5,017, the company, Marcus F. and Marcus W. Bates and R. H. Garrigue, defendants. (Garrigue was never served, did not appear, and bill was dismissed as to him.) The bill seeks to subject the unpaid stock subscription of said parties to the satisfaction of his judgment, basing the right to do so upon the alleged ground that such subscriptions, though purporting by the articles

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of association to be paid, were, in fact, not paid, but that said parties had assigned to said company in payment thereof a worthless patent. The company was defaulted, and the Bateses filed an answer denying most of the material allegations of said bill.

A hearing was had upon the bill so taken as confessed as to the company, and the answer of the Bateses, and a decree entered, finding that the Bateses and appellant each subscribed for \$10,000 of the capital stock; that \$5,000 of such stock was issued to each, and was paid for by the patent on the Woolley magnetic engine, which had been purchased by said incorporators for \$6,000, being \$2,000 each; that the agreement whereby such patent was turned over for more than that sum is void and set aside; that Marcus W. Bates and Marcus F. Bates are liable thereon in the sum of \$3,000 each; that of said \$30,000, \$7,550 in addition to the above sum has never been paid, and that the amount unpaid and owing from defendants Bates for their shares, respectively, is \$2,516.67 each. The decree appoints appellee permanent receiver, with authority to receive any unpaid subscriptions; finds that there is due the complainant on his judgment \$5,629.42; allows certain credits to the Bateses, and finds that after allowing them such credits, Marcus W. Bates is liable for \$4,591.21, and Marcus F. Bates \$4,935.62.

Executions were issued against the Bateses upon said decree and returned unsatisfied; thereupon the receiver filed a petition, charging that the Bateses were insolvent; that the amount of the judgment remained unpaid; that Garrigue (appellant) was a resident of Illinois, and was liable on his stock subscription, and prayed that he be authorized to bring suit against said Garrigue. Upon that petition an order was entered as prayed.

GEO. S. STEERE, attorney for appellant.

PRENTISS, HALL, GREGG & LEVY, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

It is contended on behalf of appellant that "the most

serious error"—to use the language of the attorney—appearing in this record, is the holding, in effect, that the decree of the Michigan court is binding upon appellant, and is in material respects *res adjudicata* as to him.

That decree is binding as to certain corporate matters. Appellant was not a party to that suit. The decree in that case does not order or make an assessment upon the stockholders or the subscribers for stock. Counsel for appellee state definitely that the case at bar is to recover as against appellant upon the ground that he is liable as a subscriber without regard to the question of what amount of stock, if any, was issued to or held by him.

It certainly would be competent for appellant to show that he was not and never had been such a subscriber, or that he had paid his subscription in cash in full. A finding by the Michigan court in a case to which appellant was not a party, could not, as to him, be *res adjudicata* as to such questions. This seems to us to be so fundamental a principle that no authorities need be cited. But see *Pennoyer v. Neff*, 95 U. S. 714; and *Gt. W. Tel. Co. v. Purdy*, 162 U. S. 329.

Upon the trial appellant, being called as a witness and having stated that stock in said company of the par value of \$6,000 had been issued to him, was asked this: "Did you pay anything for this stock?" The witness answered the question, although it was objected to by appellee's attorney upon the ground that that had been adjudicated, and the objection was sustained.

Counsel for appellant then offered to prove that appellant paid the company \$6,000 in cash for the stock issued to him. There were numerous other questions asked and offers made by appellant, which present the same question of law, but which need not be here stated at length. The ruling by the trial court was that there had been a finding upon these questions in the Michigan case, and that such finding and the decree thereon by the Michigan court were *res adjudicata* as to appellant. This case was tried upon that erroneous theory.

Bochner v. Automatic Time Stamp Co.

The original subscription of appellant was for the sum of \$10,000. If he had paid the same in full in cash to the company it would hardly be contended that he could not show that fact, because a court in another jurisdiction, in a case to which he was not a party, had decreed that such subscription had not been paid. Appellant offered to prove that he had received only \$6,000 of stock at par value, and that he had paid to the company \$6,000 in cash therefor. The most that could be claimed is that he still owed \$4,000. But the judgment is for \$5,500.

We do not deem it to be necessary for us to review in detail the great number of cases in which the liability of stockholders or subscribers for stock is considered. *Great Western Tel. Co. v. Purdy, ante*, is in the facts very like the case at bar. It is a suit brought in Iowa by a receiver appointed by an Illinois court to recover upon an assessment upon stockholders. Mr. Justice Gray, speaking for the court, says (p. 337): "In this action, therefore, brought by the receiver in the name of the company, as authorized by the order of assessment, to recover the sum supposed to be due from the defendant, he had the right to plead a release, or payment, or the statute of limitations, or any other defense going to show that he was not liable upon his contract of subscription." Appellant had the same right in the case at bar, but he was not permitted to make that defense.

The judgment of the Superior Court is reversed and the cause remanded.

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**Joseph Bochner, Mary M. Bochner and James E. Cassily
v. The Automatic Time Stamp Co.**

1. APPELLATE COURT PRACTICE—*Failure to Make a Sufficient Abstract.*—The failure to abstract material parts of the record is sufficient to justify the court in affirming the judgment, but when the adverse party does not ask for an affirmance, and the record is short, the court will ordinarily consider the case on its merits.

2. INJUNCTION BOND—*Where Good as a Common Law Obligation.*—The fact that an injunction bond was approved by the clerk, and not by the judge of the court, does not, for all purposes, make the bond a nullity; where not executed under compulsion, it is a voluntary obligation given on a good consideration, and as such is good at common law, though not as a statutory obligation.

Debt, on injunction bond. Trial in the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Finding and judgment for plaintiff. Error by plaintiffs. Heard in this court at the March term, 1898. Affirmed. Opinion filed January 26, 1899.

In a suit for injunction brought by plaintiff in error Joseph Bochner, against defendant in error, the Cook County Circuit Court, June 15, 1896, ordered and issued an injunction without requiring a bond. Subsequently, on November 23, 1896, the court made a further order, by which it was "ordered, that unless the complainant files an injunction bond in the penal sum of \$1,500, with surety to be approved by the clerk of the court, on or before Saturday next, then the injunction to be dissolved." In compliance with this order, said Bochner and the other plaintiffs in error made and entered into a bond in the penalty of \$1,500, to defendant in error as obligee, reciting the filing of the bill, the prayer for injunction to restrain defendant in error, its officers or agents, from selling, removing from the jurisdiction of the court, or in any way encumbering the tools, machinery and materials mentioned in said bill; that the court had allowed an injunction, according to the prayer of said bill, upon said Bochner giving bond with security as provided by law, and by the order of the court of November 23, 1896, granting said injunction and conditioned, viz.:

"Now, therefore, the condition of the above obligation is such, that if the above bounden Joseph Bochner, his executors or administrators or any of them, shall and do well and truly pay or cause to be paid to the said Automatic Time Stamp Company, its executors, administrators or assigns, all such costs and damages as shall be awarded against the said complainant, Joseph Bochner, in case the said injunction shall be dissolved, then the above obligation to be void, otherwise to remain in full force and virtue."

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The bond was approved by Frank J. Gaulter, clerk of the Circuit Court, but not by any judge.

After numerous applications to the court, and an extended hearing before the master, the injunction was dissolved February 15, 1897, but there was no award of damages in that proceeding. Defendant in error brought debt on the bond. Plaintiffs in error pleaded *nil debet*. A jury was waived and a trial before the court resulted in a judgment for \$1,500 debt, damages \$958 and costs, to reverse which the writ of error was sued out.

The evidence shows that plaintiffs in error incurred court costs by reason of the injunction, and to procure its dissolution the sum of \$28, and also \$930 solicitors' fees, which it was stipulated on the hearing were worth that amount, that they were for services on the dissolution of the injunction, and that the charges were reasonable, and were the usual and customary charges for such services. This stipulation is not abstracted.

F. S. MURPHEY, attorney for plaintiffs in error.

ALLEN & BLAKE and MARVIN E. BARNHART, attorneys for defendant in error.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

The failure to abstract the stipulation in regard to solicitor's fees is sufficient to justify us in affirming the judgment for want of a sufficient abstract of the record, but as defendant in error has not asked it, and the record is short, we have seen fit to consider the merits. *Martin v. McMurray*, 74 Ill. App. 44; *City of Chicago v. Fitzgerald*, 75 Id. 176; *Arnold v. Gehring*, 76 Id. 486; *Gibler v. City of Mattoon*, 167 Ill. 18.

Aside from injunctions enjoining judgments, the statute of this State (Hurd's, Ch. 69, Sec. 9) provides, in all other cases, that a bond shall be given as required by the court, judge or master granting or ordering the injunction, except

for good cause shown, a bond need not be required. Sec. 11 of the same chapter is, viz.: "All bonds required by this act shall be filed with the clerk of the court to which the writ is returnable, before such writ shall issue." In this case no bond was required before the injunction was issued, but months afterward the court ordered that unless a bond was given the injunction would be dissolved. It is claimed the bond is void because it was approved by the clerk and was not approved by the judge. We can not assent to this proposition. The statute empowered the court to issue the injunction without bond, which was done, and we see no reason why the court could not thereafter, so far as concerns its power, dissolve the injunction unless a bond was given. It is true, there is no warrant in the law for the court ordering the clerk to approve the bond (*Rutan v. Loganda Nat. Bank*, 72 Ill. App. 35, and cases cited), but that does not for all purposes make the bond a nullity. Plaintiffs in error did not execute the bond under compulsion. They might have allowed the court to dissolve the injunction. It was therefore their voluntary obligation, given on a good consideration, and as such is good at common law, though not as a statutory bond. *Wanless v. West Chicago St. R. R. Co.*, 77 Ill. App. 120, and cases cited; *Ballingall v. Carpenter*, 4 Scam. 306; *Barnes v. Brookman*, 107 Ill. 317.

The case of *Alles Plumbing Co. v. Alles*, 67 Ill. App. 252, and many others of like tenor which plaintiffs in error might have cited, are not applicable. They merely decide that because there was a failure to comply with the statute the parties so failing could have no benefit under the statute.

It being a voluntary obligation, the bond and the remedies thereon must be considered without reference to the statute. *Ryan v. Anderson*, 25 Ill. 382; *Hibbard v. McKindley*, 28 Ill. 240.

It is therefore immaterial, so far as concerns plaintiffs' right of recovery, that no damages were awarded by the chancery court in the injunction suit. It is sufficient,

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under the bond, that the damages have been awarded in this suit. Hibbard case, *supra*; Linington v. Strong, 8 Ill. App. 386; Marthaler v. Druiding, 58 Id. 336.

We can not refrain from expressing our surprise at counsel's argument, in view of the stipulation, which was not abstracted, and the evidence bearing on the amount of damages awarded by the court. This stipulation fully meets any question in that regard, the record showing, as it does, that the damages are made up of solicitors' fees, \$930, and costs, \$28, paid and incurred in procuring a dissolution of the injunction. The judgment is affirmed.

Murdoch M. McKenzie v. Wright McKenzie & Co.

1. PRACTICE—*Entering Defaults—Presumptions.*—Where the time to plead was by an order of the court "extended to and including Monday, January 10, A. D. 1898, at 10 o'clock A. M.," and thereafter on Monday, January 10, 1898, the default of the defendant was entered of record, reciting that he had failed to plead as required by the court, it will be presumed that the default was entered after the time to plead had expired.

Assumpsit, on the common counts. Error to the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the October term, 1898. Affirmed. Opinion filed January 26, 1899.

WILLIAM PETTIS, attorney for plaintiff in error.

DARROW, THOMAS & THOMPSON, attorneys for defendant in error.

MR. JUSTICE SEARS delivered the opinion of the court.

The following order was entered in this cause in the court below:

"On motion of defendant's attorney it is ordered that the time for the defendant to plead herein be and is hereby extended to and including Monday, January 10, A. D. 1898, at 10 o'clock A. M."

Thereafter, and on Monday, January 10, 1898, the default

of defendant there, plaintiff in error here, was taken and entered of record.

The default order recites: "It appearing to the court that the defendant has failed to plead, as heretofore required by this court," etc.

Judgment against the plaintiff in error was entered.

The only error assigned is that the court below rendered judgment by default when the time allowed plaintiff in error to plead had not expired.

The recitals of the default order indicate that the default was entered after the time to plead had expired, viz., after ten o'clock of the 10th of January, 1898. But if there were no such recitals, yet it would be presumed that such was the case.

In *Schuh v. D'Oench*, 51 Ill. 85, the court said :

"The only error assigned on this record is, that the court below rendered judgment by default when defendant's demurrer to the declaration had not been determined. The demurrer was filed on the 7th of April and the default was entered on the same day. But there is nothing in the record from which it can be determined which was the prior act. Had the clerk kept a minute book in which he had noted each step taken in the progress of the business of the court, in the order in which it occurred, there would have been no difficulty in knowing which was the precedent act. But in the absence of such an entry, we are left to conjecture alone, and it would not be proper for us to presume, merely from the fact that both acts were of the same date, that the filing of the demurrer was prior in point of time. We must presume that the court below acted correctly until error is shown to have been committed. This record fails to show that any exists."

By the same reasoning it would be presumed here that the default order was entered after ten o'clock of the day in question.

Counsel for plaintiff in error has, in preparing his abstract of the record, presented the order to plead incorrectly. Counsel should be extremely cautious to avoid such errors, especially such as make the case presented differ from the record and in a manner improperly favoring his client. The judgment is affirmed.

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City of Chicago v. George H. Williams.

1. CITY OF CHICAGO—*Authority of the Corporation Counsel to Employ Stenographers.*—If in the judgment of the corporation counsel it is necessary that he should, in the conduct of the city's law business, appear and defend police officers in suits for arrests made by them, he has the power to do so, and to bind the city for contingent legal expenses so incurred, to be paid out of the fund appropriated and placed at his disposal for such purposes.

2. STENOGRAPHERS—*Services Payable out of the Contingent Fund for Expenses of the Law Department.*—The employment of a stenographer to report proceedings in suits in which police officers of the city are defendants, is a legitimate expense of the law department of the city of Chicago, and properly payable out of the contingent fund for expenses of the law department.

3. SAME—*Power to Employ Implied.*—Where money is expressly appropriated as a contingent fund, for expenses of the law department of the city of Chicago, no special ordinance authorizing or directing the corporation counsel to employ a stenographer to report the proceedings in trials in which police officers are parties defendant is necessary.

4. CITIES—*Liability for Services of Stenographer.*—The fact that a city is not liable for the unlawful or negligent acts of police officers in the discharge of their duties, as, when an arrest made by them is illegal, does not exempt it from the payment of a stenographer legally employed to report the proceedings in such suits.

Assumpsit, for stenographer's services. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed January 24, 1899.

CHARLES S. THORNTON, corporation counsel, and J. R. CORRIGAN, attorneys for appellant.

JUDD & HAWLEY, attorneys for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

Appellee sued to recover for services as stenographer, rendered in a trial of a suit brought against the chief of police of the city of Chicago and one of his officers. The

latter were defended by the assistant corporation counsel of the city, who testifies that he employed appellee to do the stenographic work in that case. There is no contention that the service was not rendered, nor that the charges made were not the usual and ordinary rates paid to stenographers in Chicago for the work done.

The contention of the city is, that it "is not liable for damages for torts committed by its police," and therefore not "liable for a court stenographer's services employed in the defense of one of its police in an action on the tort."

A section from the ordinances of the city of Chicago, defining the duties of the corporation counsel, was introduced in evidence, which requires him to "superintend, with the assistance of the city attorney and prosecuting attorney, the conduct of all the law business of the city."

It is doubtless true that the city is not liable for the unlawful or negligent acts of police officers in the discharge of their duties, as, for example, "for an arrest made by them which is illegal for want of a warrant, or for other cause." Dillon on Municipal Corp., Sec. 975.

But the corporation counsel, charged with superintending the conduct of the law business of the city, may have had good reason for concluding that it was for the interest of the city that he should appear as counsel for its chief of police in the suit in question. There was at his disposal a contingent fund, for expenses of the law department, out of which stenographer's bills were paid, and a "large amount of that fund was unexpended" at the time the appellee's bill was presented. The money for this contingent fund had been duly appropriated in the annual appropriation bill. That the employment of a stenographer is a legitimate expense of the law department is not controverted. The money having been expressly appropriated for such expenses, no special ordinance authorizing or directing the employment of appellee was necessary.

If in his judgment it was necessary or advisable that he, representing the law department of the city, should in the conduct of its law business appear and defend these police officers in that suit, the corporation counsel had the power

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so to do and to incur liability for the city for contingent legal expenses so incurred, payable out of the fund appropriated and placed at his disposal for that purpose. The judgment of the Superior Court is affirmed.

Enoch H. Fudge v. The Seckner Contracting Co.

1. **PRINCIPAL AND AGENT—Unauthorized Employment of a Sub-agent by the Agent Does Not Render the Principal Liable.**—The mere fact alone that an agent employs a sub-agent to do the work, to do which the agent was employed, does not make the principal liable for what the agent has himself, unauthorized, promised to pay the sub-agent.

Assumpsit, for services. Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Verdict and judgment for defendant by direction of the court. Appeal by plaintiff. Heard in this court at the March term, 1898. Affirmed. Opinion filed January 26, 1899.

Appellee, the Seckner Contracting Company, built a system of water works for the East Chicago Water Works Company, in part payment for which it was to receive \$70,000 of East Chicago Water Works Company bonds. Hatch, the president of the East Chicago Water Works Company, wrote the following letter to appellant:

“CHICAGO, October 9, 1894.

E. H. FUDGE, Esq., Chicago, Ill.

DEAR SIR: In the event P. K. Tyng & Co., of Buffalo, N. Y., purchase the \$70,000 issue of East Chicago Water Works Co. bonds at ninety-five cents on the dollar and accrued interest, I hereby agree to pay you the difference between the amount realized thereby and ninety cents on the dollar and accrued interest.

Very respectfully,

N. P. R. HATCH,

President East Chicago Water Works Company.”

This letter was a formal proposition made after a number of conversations in relation to the matter. Appellant testified that in the course of such conversations the following occurred:

"Hatch said '\$10,000 of these bonds belong to me personally, and the other \$70,000 belong to the contractors who were constructing the work.' He did not say who those contractors were, but that he had a right to sell them."

The proposition was accepted by Mr. Fudge, and in October, 1894, by his procurement, P. K. Tyng & Co., of Buffalo, N. Y., entered into a contract with Hatch to purchase \$80,000 worth of East Chicago Water Works Company bonds. Some delay having occurred in procuring and forwarding to Tyng & Co. the opinion of attorneys and other papers relating to said bonds, Tyng & Co. did not receive and pay for \$14,000 worth of these bonds. About February 4, 1895, a telegram was sent to Tyng & Co. by N. P. R. Hatch, as follows:

"CHICAGO, Feb. 4th, 1895.

If you will take \$5,000 East Chicago bonds to-day or to-morrow, Chicago delivery, we will release you from balance and all claims for damage. What shall I do with New Mexico certificates enclosed me?

N. P. R. HATCH."

Thereafter Tyng & Co. received another dispatch from Mr. Hatch stating that the Seckner Contracting Company had demanded the bonds of him, and he could not deliver them to Tyng & Co. Immediately following this last dispatch came a letter to Tyng & Co. from the Seckner Contracting Company, as follows:

"CHICAGO, Feb. 5th, 1895.

MESSRS. P. K. TYNG & Co., Union Central Life Building,
Buffalo, New York.

GENTLEMEN: We send you to-day by American Express Company \$5,000 worth of East Chicago Water Works bonds with sight draft on you for \$4,804.16, in accordance with your telegraphic message to N. P. R. Hatch to-day, and if this draft is paid we agreed to release you and Mr. Hatch from any damage on account of non-fulfillment of contract for the purchase of the total issue of East Chicago Water Works bonds.

Yours respectfully,

SECKNER CONTRACTING COMPANY,
J. H. BROWN, Treasurer."

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Upon receipt of this letter Tyng & Co. accepted the bonds so sent by the Seckner Contracting Company and paid the company therefor the sum above named in the letter.

The plaintiff having afterward made demand upon Hatch for his commission and not having received the same, made a demand in writing upon the Seckner Contracting Company for the sum of \$3,500 commission for the sale of the \$70,000 worth of the bonds. This demand was delivered to J. H. Brown, treasurer of the Seckner Contracting Company, who then stated to Mr. Fudge that the Seckner Contracting Company had in its hands the commission due on the bonds last taken and paid for by Tyng & Co., namely, \$250. Brown, accompanied by Mathis, an attorney, went with Fudge to the office of Hatch, where a demand was made that he pay over the \$3,500 commission upon the other bonds, and the accrued interest, neither of which he had as yet paid. Hatch then stated that he was the owner of the bonds and that the Seckner Contracting Company had nothing to do with the matter.

There was evidence which tended to show that Brown, the treasurer of appellee, made statements after the sale of the bonds, to the effect that appellee was owner of the bonds, and that Hatch sold them for appellee; also that Hatch had upon some sales made, represented to appellee that he was obliged to allow part of purchase price paid for the bonds to a broker for his services in effecting such sales.

Appellant testified that Brown promised that the \$250 should be paid to him.

After a number of interviews between Brown and appellant, the former stated, in response to a demand by appellant for the \$250 of commissions, "Well, there is a question come up in my mind whether that money belongs to you or Hatch; we will pay it to whoever it belongs."

At the close of the evidence for appellant, then plaintiff, the court, on motion of appellee, instructed the jury to find for appellee, the defendant.

FREDERICK A. WILLOUGHBY, attorney for appellant.

HOWARD AMES, attorney for appellee; EUGENE CLIFFORD, of counsel.

MR. JUSTICE SEARS delivered the opinion of the court.

It is contended by counsel for appellant that the trial court erred in thus peremptorily directing a verdict.

In support of such contention it is urged, first, that the evidence would warrant a conclusion by the jury that Hatch was the agent of appellee, authorized to procure a broker, and that acting under such authority he did employ appellant; and, secondly, that if this were not so, yet the fact of Hatch being appellee's agent to sell the bonds would warrant the employment of appellant as a sub-agent, and that such sub-agency was ratified by appellee.

The maintenance of one or the other of these two propositions is essential to a possible right of recovery. We are unable to assent to either.

The evidence not only does not establish that Hatch was employed by appellee to procure a broker, but, on the contrary, there is no evidence tending thereto.

The other proposition is, that the nature of the employment of Hatch by appellee, *i. e.*, to sell the bonds, was such an employment as would, as a matter of law, authorize Hatch to procure a broker as a sub-agent for appellee, and by such employment obligate appellee to pay the broker's commissions. To sustain this proposition we find no authority in the cases cited elsewhere. Against it is the authority of many decisions. *Corbett v. Schumacker*, 83 Ill. 403; *Solly v. Rathburn*, 2 Maule & Selw. 298; *Cockran v. Irlam*, Id. 301; *Paddock v. Colby*, 18 Vt. 485.

If it could be said that appellee had employed Hatch to procure a broker, then appellant could, as is urged by counsel, insist upon his rights against appellee, the undisclosed principal, even although appellee knew nothing of the agency of Hatch when the transaction was had. But no agency of Hatch for any such purpose is disclosed by the evidence. On the contrary, whatever evidence bears upon this question shows that Hatch was acting in his own behalf in

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efforts to dispose of the bonds for the appellee and for a compensation to be paid to and received by him. If, in performing the work for which he was to be compensated, he chose to employ others to assist him, his so doing could in no measure obligate appellee. There is no evidence showing or tending to show a ratification of any employment of appellant by Hatch on behalf of appellee. After the sale a demand in writing was made upon appellee by appellant for his commissions, and service of the demand was acknowledged, but no agreement was entered into to pay the amount demanded.

But it is contended as to the \$250 which Brown admitted was still in appellee's hands, that Brown obligated appellee to pay this amount to appellant. No authority is shown in Brown to thus undertake for appellee to pay to appellant money which belonged to Hatch. In the absence of such showing it is unnecessary to inquire as to the sufficiency of any consideration for the making of the alleged agreement.

The theory of appellant's case was disclosed by the bill of particulars filed with the declaration, the common counts. It is as follows:

“BILL OF PARTICULARS.

“On the 9th day of October, A. D. 1894, at Chicago, Newton P. R. Hatch, on behalf of said Seckner Contracting Company, and as said company's agent thereunto authorized, made a proposition to the plaintiff that if the plaintiff would procure P. K. Tyng & Co., of Buffalo, New York, to purchase the \$80,000 issue of East Chicago Water Works Company bonds at ninety-five cents on the dollar and accrued interest, said Seckner Contracting Company would pay to plaintiff the difference between the amount realized thereby and ninety cents on the dollar and accrued interest, which proposition said plaintiff then and there accepted; and afterward procured said P. K. Tyng & Co. to purchase said bonds at ninety-five cents on the dollar and accrued interest, being the sum of \$80,000, whereby and by virtue of said proposition and acceptance the said Seckner Contracting Company then and there became liable to pay and became indebted to said plaintiff in the sum of \$4,900, said sum being the difference between the amount

for which said bonds were purchased by P. K. Tyng & Co. and ninety cents on the dollar and accrued interest; neither said sum of \$4,000 nor any part thereof having been paid to plaintiff, although demand therefor has been made on said defendant by said plaintiff, this suit is brought to recover said amount so due and payable to the plaintiff as aforesaid."

Appellant failed to present any evidence which would sustain a recovery upon this theory, or upon any other, and none which the court was bound to submit to the jury. Hence, there was no error in directing a verdict. The judgment is affirmed.

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Samuel C. Rank v. The People of the State of Illinois.

1. INSTRUCTIONS—*Under Section 195 of the Criminal Code.*—An indictment under Par. 195 of Chap. 38, 1 S. & C. R. S. (Hurd's Statute 1898, p. 564, Sec. 98), which avers that the defendant "did verbally and maliciously threaten to accuse the said J. H. A. of a certain misdemeanor, to wit, selling intoxicating liquors without then and there having a legal license to keep a dram-shop, with intent to extort money from the said J. H. A.," etc., does not describe or charge a misdemeanor, and is not sufficient, as the act threatened does not constitute a crime or misdemeanor.

2. SAME—*Facts Must Be Averred.*—In every indictment facts must be averred which, in the eye of the law, constitute the crime charged.

3. SAME—*Description of Offenses.*—Whether the description of the offense is so plain that its nature can be easily understood by the jury, must depend on whether it is described with at least a reasonable degree of certainty, using the term "certainty" in its common law sense.

Indictment, for threatening to accuse another, etc. Tried in the Criminal Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Verdict and judgment of guilty. Error by defendant. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed January 26, 1899.

JOHN C. KING and KITT GOULD, attorneys for plaintiff in error.

CHARLES S. DENEEN, State's Attorney, and ALBERT C. BARNES, Assistant State's Attorney, for defendant in error.

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MR. JUSTICE ADAMS delivered the opinion of the court.

Plaintiff in error was indicted and convicted for a violation of the following section of the Criminal Code, which provides that, "Whoever, either verbally or by written or printed communication, maliciously threatens to accuse another of a crime or misdemeanor, or to expose or publish any of his infirmities or failings, with intent to extort money, goods, chattels or other valuable thing, or threatens to maim, wound, kill or murder, or to burn or destroy his house or other property, or to accuse another of a crime or misdemeanor, or expose or publish any of his infirmities or failings, though no money, goods, chattels or valuable thing be demanded, shall be fined in a sum not exceeding \$500, and imprisoned not exceeding six months." 1 S. & C. Stat., Ch. 38, Par. 195.

The indictment charges as follows:

"Samuel C. Rank, late of the county of Cook, on the first day of November, in the year of our Lord one thousand eight hundred and ninety-seven, in the said county of Cook and said State of Illinois aforesaid, unlawfully and willfully did then and there, to one John H. Anderson, verbally and maliciously threaten to accuse the said John H. Anderson of a certain misdemeanor, to wit, selling intoxicating liquors without then and there having a legal license to keep a dram-shop, with intent to extort money from the said John H. Anderson," etc.

Motions to quash the indictment, for a new trial, and in arrest of judgment, were made and overruled.

Sections 1 and 2 of the dram-shop act are as follows:

"Sec. 1. A dram-shop is a place where spirituous or vinous or malt liquors are retailed by less quantity than one gallon, and intoxicating liquors shall be deemed to include all such liquors within the meaning of this act.

"Sec. 2. Whoever, not having a license to keep a dram-shop, shall by himself or another, either as principal, clerk or servant, directly or indirectly, sell any intoxicating liquor in less quantity than one gallon, or in any quantity to be drunk upon the premises, or in or upon any adjacent room, building, yard, premises or place of public resort, shall be fined," etc. 2 S. & C. 48, Secs. 1 and 2.

It will be observed that there is nothing in the sections

quoted prohibiting the sale of liquor in quantities of one gallon or more, unless it is sold to be drank on the premises or in or upon any adjacent room, building, yard, premises or place of public resort, so that intoxicating liquor may be sold, without license to keep a dram-shop, in quantities of a gallon or more, if not sold to be drank on the premises or places mentioned in section 2.

The charge in the indictment is that plaintiff in error did threaten to accuse the said John H. Anderson of a certain misdemeanor, "to wit: *Selling intoxicating liquors without then and there having a license to keep a dram-shop.*" To sell intoxicating liquor in quantities of one gallon or more, not to be drank in such places as are mentioned in section 2, without having a license to keep a dram-shop, is not a misdemeanor, or crime, and therefore plaintiff in error contends that no violation of the statute is charged against him in the indictment; that he is merely charged with having threatened to accuse Anderson of doing that which he, Anderson, might lawfully do, viz., selling intoxicating liquors without having a license to keep a dram-shop.

Counsel for the people rely on section 408 of the statute, which provides that "Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood by the jury and contends that the indictment in question is sufficient in view of this provision. While it is true that it may be sufficient to state the offense in the terms and language of the statute, yet, whatever the language used, an offense must be stated, and the question here is whether an offense is stated.

We can not agree with the contention of counsel for the people that the words in the indictment, "to wit, selling intoxicating liquors, without then and there having a legal license to keep a dram-shop," may be rejected as surplusage, and that a mere averment that plaintiff in error

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threatened to accuse Anderson of a misdemeanor is sufficient to sustain a conviction. Whether the threat made was a threat to accuse of a misdemeanor is a question of law, to be determined by the court on inspection of the words constituting the threat; what the words were is a question of fact, and it is a fundamental rule, both of civil and criminal pleading, that facts and not conclusions of law must be averred. In every indictment facts must be averred which, in the eye of the law, constitute the crime charged. Archibald's Cr. Pr. & Pl., 2d Ed., p. 265, par. 85; 1 Bishop on Crim. Procedure, 3d Ed., Secs. 623 to 626; McNair v. The People, 89 Ill. 441; Thompson v. The People, 96 Ib. 158; Williams v. The People, 101 Ib. 382.

In McNair v. The People, the indictment was for a violation of Sec. 223 of the Criminal Code, and charged the defendant, in the language of the section, with causing to be printed "a certain obscene or indecent pamphlet," with intent to give the same away; the unlawfully having in his possession "a certain obscene and indecent pamphlet," and the unlawfully giving away "a certain obscene and indecent pamphlet." The court held the indictment insufficient to sustain a conviction, saying :

"While section 408 is broad and comprehensive, a majority of the court are of opinion that, under this section, it was necessary to set out the supposed obscene matter in the indictment, unless the obscene publication is in the hands of the defendant, or out of the power of the prosecution, or the matter is too gross and obscene to be spread on the records of the court, either of which facts, if existing, should be averred in the indictment, as an excuse for failing to set out the obscene matter; that whether obscene or not, is a question of law and not of fact; that the question is for the court to determine, and not for the jury."

The court further say :

"The practice has generally required more than a mere charge, in the language of the statute, that the accused has committed a crime."

Section 273 of the Criminal Code provides: "Whoever attempts to commit any offense prohibited by law, and does any act toward it, but fails, or is intercepted or prevented

in its execution, shall be punished," etc. In *Thompson v. The People*, *supra*, the indictment averred that the defendant, "the goods and chattels of Aaron Nooney then and there being found, did feloniously attempt to feloniously take, steal and carry away," etc. The court, after stating that it is indispensable to the crime that some act should be done toward the accomplishment of the intention, say:

"If this be so, and of its correctness we entertain no doubt, then to obtain a conviction, the people would be required to prove acts done toward the perpetration of the offense, and not a mere intention. Such acts being necessary to show the crime charged, they should be specifically averred. This is necessary, according to the rules of correct pleading, and to give the accused notice of what he is required to meet on the trial. If the averment of a mere attempt was all that is required, accused could never know what acts would be relied on to prove the attempt, and would be liable to surprise. We are, therefore, clearly of opinion that the acts done by accused toward the commission of the crime of larceny should have been specifically averred, and for the want of such an averment the indictment was bad and should have been quashed."

In *Williams v. The People*, *supra*, the court say:

"Indeed, it is an elementary and fundamental principle that every material *fact* essential to the commission of a crime must be distinctly alleged and clearly proven on the trial, in order to warrant a conviction."

The definition of an offense is one thing; a statement of the particular facts which constitute the offense is another and quite a different thing. In the present case, the statute merely defines the offense in general terms. It does not purport to state specific acts or words which would constitute the offense. It is generic, leaving to the pleader to be specific in his averment of facts.

In *Johnson v. The People*, 113 Ill. 99, the court say:

"It sometimes happens, however, that the language of a statute creating a new offense does not describe the act or acts constituting such offense. In that case, the pleader is bound to set them forth specifically. This elementary rule is laid down in all standard works on criminal law, and is fully recognized by this court. 1 Wharton on Crim. Law, Secs. 164, 372; *Kibs v. The People*, 81 Ill. 599."

Rank v. The People.

In *Prichard v. The People*, 149 Ill. 50, it seems to have been urged by counsel for the people, that if the offense was so plainly charged that its nature could be easily understood by the jury, that was sufficient, in respect to which the court say :

“ Whether the description of the offense is so plain that its nature could be easily understood by the jury, must depend on whether it is described with at least a reasonable degree of certainty, using the term ‘certainty’ in its common law sense.”

The indictment was for bigamy, and alleged that the defendant married one Virginia M. Lewis, “ well knowing the said Eliza Ann Ferguson, his former wife, was then alive.” The court held that this was not a sufficient averment that the former wife of the accused was alive; that the rules of pleading required a direct and positive averment that the former wife was living at the time of the second marriage; and the judgment of conviction was reversed.

Section 82 of chapter 46 of the statutes, provides :

“ Whoever * * * changes a ballot of an elector, with intent to deprive such elector of voting for such person as he intended, * * * shall, on conviction thereof, be fined in a sum not exceeding \$1,000, or imprisoned in the county jail not exceeding one year, or both, in the discretion of the court.”

In *Hunter v. The People*, 52 Ill. App. 367, the indictment charged that Hunter, “ at an election being held in the town of Mount Zion, in the county of Macon, for the election of town officers for said town, unlawfully, willfully and deceitfully, did change a certain ballot of one John Tohill, who was then and there an elector of said town, in the county aforesaid, with intent then and there, unlawfully to deprive the said John Tohill, as such elector, of voting for one David C. Davidson, for the office of supervisor of said town of Mount Zion, as he, the said John Tohill, then and there intended, contrary to the form of the statute,” etc. The court, after suggesting numerous ways in which the change of the ballot might have been made, held that it was necessary for the indictment to specify the acts of the

defendant in the premises, the manner in which he changed the ballot, and the judgment was reversed. The court quotes with approval the following from Wharton on Crim. Pl. and Prac.:

“ A statute on creating a new offense describes it by its popular name. It is made indictable, for instance, to obtain goods by falsely personating another. But no one would maintain that it is enough to charge the defendant with ‘falsely personating another.’ So far from this being the case, the indictment would not be good unless it stated the kind of personation, and the person on whom the personation took effect. An act of Congress makes it indictable to ‘make a revolt,’ but under this act it has been held necessary to specify what the revolt is. ‘Fraud’ in elections in a Pennsylvania statute is made indictable; but the indictment must state what the fraud is. It is not enough to say that the defendant ‘attempted an offense,’ though this is all the statute says; the particulars of the attempt must be given. ‘Not a qualified voter’ in a statute must be expanded in the indictment by showing in what the disqualification consists.”

In the present case, the specific threat averred, viz., to accuse Anderson of “selling intoxicating liquors, without then and there having a legal license to keep a dram-shop,” does not describe or charge a misdemeanor, and if these words be rejected as surplusage, leaving the charge that plaintiff in error did unlawfully and maliciously, etc., “threaten to accuse the said John H. Anderson of a misdemeanor,” the averment is merely of a legal conclusion, and not of a fact, and in view of the authorities cited, facts constituting the crime must be averred.

The indictment is clearly bad and insufficient to support the conviction, which being the case, we deem it unnecessary to discuss the evidence. The judgment will be reversed and the cause remanded.

**Cornelia O. Tobin, Benjamin F. Tobin, Grace L. Boggs
and A. W. Tobin v. F. F. French, J. A. Wood-
bury and E. M. Ashcraft.**

1. **PRACTICE—*Amendments Preserving the Identity of the Action.***—Under Sec. 24, Chap. 110, R. S., providing that amendments may be allowed introducing any party necessary to be joined as plaintiff or defendant, and that the adjudication of the court allowing such amendment shall be conclusive evidence of the identity of the action, an order of the Circuit Court upon the plaintiff's motion, permitting all papers and proceedings in an action upon an appeal bond to be amended by changing the name of the plaintiff from "the Benjamin F. Tobin Estate," to "Mrs. C. O. Tobin, Grace L. Boggs, Arthur W. Tobin, Cornelia W. Tobin and Benjamin F. Tobin," as plaintiff, is sufficient to preserve the identity of the action.

2. **AMENDMENTS—*Identity of Parties to Actions Admitted by Demurrer.***—Where the plaintiffs in a former action were changed by amendment and their identity is at issue in a suit growing out of such former action, if the declaration alleges that the plaintiffs in such former action, and the one growing out of it, are one and the same, a demurrer to such declaration admits the allegation of identity.

3. **PARTIES—*Identity of, How Determined on Demurrer.***—When the identity of the plaintiffs in a former suit and in an action growing out of such former suit is at issue on a demurrer to the declaration, such identity is to be determined from the face of the pleadings.

Debt, upon an appeal bond. Trial in the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Judgment for defendant, on demurrer to declaration. Appeal by plaintiff. Heard in the Branch Appellate Court, at the March term, 1898. Reversed and remanded. Opinion filed January 24, 1899.

This is an action of debt upon an appeal bond. Appellants' declaration recites that plaintiffs, under the name, style and description of the Benjamin F. Tobin Estate, recovered possession of certain premises before a justice of the peace, in an action of forcible entry and detainer, with cost of suit, against the defendant French; that the latter appealed from said judgment to the Circuit Court, and in and by his appeal bond therein filed, it was provided that if he, said French, should prosecute his said appeal with effect, and pay plaintiffs, the Benjamin F. Tobin Estate, all costs, dam-

ages and loss by plaintiffs sustained, in case said judgment should be affirmed, then the obligation to be void; otherwise to remain in full force and effect.

The declaration further recites that upon plaintiffs' motion, the Circuit Court permitted all papers and proceedings in the case to be amended by changing the name of the plaintiff, the Benjamin F. Tobin Estate, to Mrs. C. O. Tobin, Grace L. Boggs, Arthur W. Tobin, Cornelia W. Tobin and Benjamin F. Tobin, as plaintiffs; that thereafter said court affirmed the judgment of the justice of the peace, and that the plaintiffs recovered judgment in said Circuit Court against said French for costs and possession of the premises; and states that "these plaintiffs allege the fact to be that the Benjamin F. Tobin Estate is the name, style and description under which Cornelia O. Tobin, Benjamin F. Tobin, Grace L. Boggs and A. W. Tobin were then doing business," and that the Benjamin F. Tobin Estate, and said last named persons "are one and the same;" that the condition of the appeal bond has been broken, and plaintiffs are entitled to recover.

The Superior Court sustained a demurrer to this declaration, and plaintiffs appeal.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for appellants.

WILLIAM E. FREER, attorney for appellees.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

It is contended for appellees, in the first place, that in consequence of the amendment stated in the declaration to have been made in the Circuit Court, changing the name of the plaintiff, and substituting for the "Benjamin F. Tobin Estate" the names of individuals alleged to have been doing business under that name, style and description, the plaintiffs who recovered in that suit ceased to be identical with the obligee in the bond, and that the judgment rendered

Tobin v. French.

therein was not an affirmance of the judgment of the justice which was appealed from, and hence there is no liability upon the appeal bond.

It is expressly provided in the Practice Act (Rev. Stat., Chap. 110, Sec. 24) that amendments may be allowed introducing any party necessary to be joined as plaintiff or defendant, and that "the adjudication of the court allowing an amendment shall be conclusive evidence of the identity of the action." The language of that section is very broad, and whether the amendment in question was properly within its terms or not, the identity of the *action* after the amendment, with the suit in which the appeal was taken, can not now be disputed. The judgment in favor of plaintiffs in that suit was therefore an affirmance in the same action of the judgment appealed from.

It is contended that the plaintiffs, having been changed by the amendment, their identity with the obligee in the bond was lost. It is alleged in the declaration that "the Benjamin F. Tobin Estate," and the plaintiffs herein, "are one and the same parties," and that the plaintiffs "were at that time trading and doing business" under "the name, style and description" of the Benjamin F. Tobin Estate. If this is true, the change was merely nominal. That allegation of the declaration is admitted by the demurrer.

But it is urged that if the identity of the plaintiffs with the obligee in the bond can not be gathered from the face of the instrument, no pleading or parol evidence can be permitted to connect them.

The real question, however, is whether, according to the declaration, there is a record in the Circuit Court in the case appealed there from the justice, showing any disposition of that suit *between the parties named* in the bond, and hence a breach of its condition. Block v. Blum, 33 Ill. App. 643, 644.

The declaration avers that the writing obligatory sued upon "was and is subject to a certain condition thereunder written, whereby, after reciting to the effect that * * * *the plaintiffs, under the name, style and description of the Ben-*

jamin F. Tobin Estate, recovered against the said F. F. French in a certain action of forcible entry and detainer for the possession of certain premises," describing them. If the literal language of the recital in the condition of the bond is that the plaintiffs named in the declaration herein recovered under the name of the Benjamin F. Tobin Estate, there can be no doubt that the record in the Circuit Court, as set forth in the declaration, shows a disposition of the suit there between the parties named in the bond. Such is, however, substantially the averment of the declaration itself. Do the facts as alleged in the declaration justify this averment? In *O'Connel v. Lamb*, 63 Ill. App. 652, 654, the court says:

"It is attempted in the declaration, by averment, to substitute in the bond another and entirely different obligee. As a matter of fact that would depend on the truth of the averment, which is that the different designations of the obligee in the bond and declaration were intended to indicate one and the same party. * * * The averments in this declaration do not contradict the bond, nor propose the making of a new contract, but to identify the party for whose use the suit is brought with the obligee in the bond, * * * and so remove a doubt raised by matter *dehors* the bond. Appellee's counsel have not cited any case upon the question, and we are not prepared to hold, upon principle, that this is not such an ambiguity as may be met by averment and proof, even as against sureties."

Here there is no averment of a mistake in the bond, to be helped out by extrinsic evidence. The allegation is that the obligee in the bond and the plaintiffs are one and the same; that the plaintiffs *are* the obligee to whom the obligation directly runs. If this averment is proved by extrinsic evidence the liability upon the bond is not thereby extended. Principal and sureties are still bound "to the extent, in the manner and under the circumstances pointed out in the obligation, and no further." *C. & A. R. R. Co. v. Higgins*, 58 Ill. 128, 133.

If the averment is true the change in the name of the plaintiffs was not a substitution of other parties for the original plaintiffs, as was the case in *Morse v. Goetz*, 51 Ill.

Bour v. Pinney.

App. 485, cited by appellees' counsel, and appellees were in no respect prejudiced thereby. The amended declaration, while perhaps in some respects informal, states, in our judgment, a good cause of action, and the Superior Court erred in sustaining the demurrers.

For the reasons indicated the judgment of that court is reversed and the cause remanded.

John Bour v. Daniel H. Pinney.

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1. **NEGOTIABLE PAPER—Acceptance of—Presumptions.**

Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Affirmed. Opinion filed January 24, 1899.

Opinion by MR. PRESIDING JUSTICE FREEMAN holds, upon the authority of *Wilhelm v. Schmidt*, 84 Ill. 183, 187, and *Stone & Gravel Co. v. Gates Iron Works*, 124 Ill. 623, 627, that the mere acceptance by the creditor of a negotiable note of a third person, makes it but collateral security; and when given for a pre-existing debt, the presumption is that it was not the intention of the parties that it should operate as an immediate and absolute satisfaction and discharge of the debt, in the absence of an actual agreement, or evidence justifying a positive inference to that effect. Affirmed.

JAMES SMITH, attorney for appellant.

PINNEY & ORR, attorneys for appellee.

Laura U. Elliott v. Emerson Piano Co., Patrick H. Powers et al.

1. **SALES—Providing for Possession in the Purchaser, and Title in the Vendor.**—A contract for the sale and delivery of the immediate possession of a piano to a purchaser, but providing that the title remain in the vendor until all payments for it are made, and when so made

to vest in the purchaser, and permitting the vendor to retake possession or to enforce payment of the amount due, at his option, is, in effect, a sale and delivery of the piano, and although the parties agree, as between themselves, that the title is to remain in the vendor, as to third parties without notice such title vests immediately in the purchaser, the piano being in the possession of the purchaser.

2. *SAME—Having the Effect of Mortgage Liens upon the Property Sold.*—Every conveyance of personal property, having the effect of a mortgage or lien upon such property, to be valid as against the rights and interests of third persons, must provide for the possession of the property to remain with the grantor, and be acknowledged and recorded.

Replevin, for goods distrained for rent. Trial in the County Court of Cook County, on appeal from a justice of the peace; the Hon. WALES W. WOOD, Judge, presiding. Finding and judgment for plaintiffs. Appeal by defendant. Heard in the Branch Appellate Court at the March term, 1898. Reversed and remanded. Opinion filed January 24, 1899.

This was a replevin suit by appellees to recover a piano, taken by appellant from one Roberts under a distress warrant for rent. Appellees claimed to be the owner of the piano. They had sold it to Roberts about two and one-half years before, to be paid for in small payments, under a contract in which he agreed that the piano should remain the property of the appellees until paid for. The piano had remained in Roberts' possession. He had paid \$146 out of the purchase price of \$365. It is now said to be worth about \$175 or \$180. Testimony was admitted tending to show that Roberts had stated to appellees, about a month before the distraint, that he would like to return the piano and cancel the contract, as he could not keep up the payments, owing to his wife's illness; but that he wished to retain the piano until he could take his wife away, and would notify appellees when he was going; that this was agreed to, and it was understood the piano was to remain in Roberts' possession two or three months longer. It does not appear, however, that the contract of sale to Roberts was ever actually canceled.

JONES & STRONG, attorneys for appellant.

JOHN C. TRAINOR, attorney for appellees.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

The contract with Roberts was in form and effect a promissory note and chattel mortgage. It provided that the "instrument is and shall remain the property of the said Emerson Piano Co." until all the payments for it should be made; but it also provided that when they were made the "full, absolute and complete title" should vest in the purchaser. It contemplated immediate delivery of the piano to Roberts and allowed him its possession and use. It permitted appellees to "retake possession" or to enforce "payment and collection" of the amount of the purchase price at their option. The language of the contract indicates a sale and delivery of the piano, and although the parties agreed as between themselves that the title should remain in appellees, as to third parties without statutory or other notice it vested immediately in the purchaser. *Blatchford v. Boyden*, 122 Ill. 657, 668.

The statute provides that "no mortgage, trust deed, or other conveyance of personal property, having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interests of any third person unless * * * the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded as hereinafter directed, and every such instrument shall, for the purposes of this act, be deemed a chattel mortgage." Rev. Stat., Chap. 95, Sec. 1.

This contract must "be deemed a chattel mortgage." It was not acknowledged and recorded, as required by the statute, and was invalid as against third parties.

It is urged, however, that whatever right or title Roberts had under the contract was released and canceled November 9th prior to the distraint, and that "the piano became the property of the appellees." There is testimony to the effect that Roberts expressed a desire that appellees should take the piano back and cancel the contract. The memorandum of November 9th, entered on appellees' books, is as

follows: "Called and said could not make payment on account of sickness in family, and would like to keep piano. Arrangements made to leave piano for few months—say about January 21, 1897." This does not show a cancellation of the contract, nor any surrender on the part of Roberts. There was here no "legal sale and delivery" to appellees as in *Hqwdyshell v. Gary*, 21 Ill. App. 288, 291, cited by appellees' counsel, and there was no change in the relation of the parties nor in the possession or title to the piano. The agreement to return it or to receive it back and cancel the contract, if so made, was still unexecuted. The provisions of Sec. 16, Chap. 80, Rev. Stat., providing that "in no case shall the property of any other person," although found on the premises, be liable to seizure for rent, are not, therefore, applicable.

For the reasons indicated, the judgment of the County Court must be reversed and the cause remanded.

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Famous Manufacturing Co. v. Francis Wilcox and George A. Wilcox.

1. **RATIFICATION**—*Of Acts of an Attorney in Entering Appearance.*—Where the general manager of a corporation makes an affidavit stating that a certain person was its "duly appointed attorney," it is a ratification of the act of such attorney in entering its appearance in a suit and such corporation can not afterward be heard to say that such person was not its authorized attorney.

2. **ATTORNEYS**—*Effect of Withdrawing After Entry of Appearance.*—The withdrawal of an attorney from a cause, without withdrawing the demurrer which he had filed to the complaint, does not affect his prior entry of appearance, or defeat the jurisdiction of the court acquired by such appearance.

3. **REVERSIBLE ERROR**—*In Propositions of Law.*—When it appears from the whole record that substantial justice has been done a judgment will not be reversed because of error in holding or refusing to hold propositions of law.

Debt, on a judgment of a sister State. Trial in the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Finding and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed January 26, 1899.

Famous Mfg. Co. v. Wilcox.

WALTER OLDS, CHARLES F. GRIFFIN and EDWARD W. WICKEY, attorneys for appellant.

EDGAR BRONSON TOLMAN and SUMNER C. PALMER, attorneys for appellees.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from the judgment rendered in an action of debt by appellees against appellant on a judgment rendered by the District Court of the State of Idaho, for the Fifth Judicial District, in the county of Bear Lake in said State. The cause was, by agreement, tried by the court, and appellees recovered judgment.

The sole contest between the parties is as to whether the Idaho court had jurisdiction to render the judgment sued on, appellant contending that the court had not jurisdiction, either by personal service of process on appellant, or by its appearance. Service was had on Edward H. Beall, as an agent of appellant, but it is admitted by appellees that the service on Beall was not such as is required by the statute of Idaho to give jurisdiction to the court. The question, therefore, is whether the court obtained jurisdiction by appellant's appearance. S. J. Rich, an Idaho attorney, appeared for appellant and filed a demurrer to appellees' complaint January 20, 1891, after the filing of which he withdrew from the cause, and February 11, 1891, after Rich withdrew, the demurrer was overruled and judgment was rendered for appellees. October 12, 1891, appellant, by John A. Bagley, its attorney, moved the court to set aside the default "upon the ground that the default was taken by inadvertence and excusable neglect," and in support of this motion, filed his own affidavit and the affidavits of K. M. Turner, E. W. Wickey and S. J. Rich.

Bagley deposed that he was the attorney for appellant; that Beall was a traveling salesman of appellant and employed Rich; that Rich, "exercising due diligence," wrote and telegraphed to appellant for instructions, but receiving none, was unable to make a defense and withdrew

from the case, and that affiant, after investigation, verily believed that appellant had a good and substantial defense on the merits.

K. M. Turner deposed that he was the duly appointed general agent of appellant, and had entire charge of its collection and claims department, and of the suit against it by appellees; that *S. J. Rich was duly appointed attorney for appellant to protect the suit*, and that, at the time Rich telegraphed for instructions, he, Turner, was seriously ill in bed and unable to give instructions as requested, and that Wickey, the only other person conversant with the case and authorized to give instructions, was out of the city.

Wickey deposed that he was secretary for appellant; that Turner was appellant's agent and had charge of the suit, as stated in his, Turner's, affidavit; that it was the intention of appellant to defend the suit, and that he, Wickey, was under the impression that instructions had been given the attorney to defend the suit.

Rich deposed that he was employed by appellant to defend the suit, through its traveling agent, Beall, and stated his reasons for withdrawal from the defense, substantially as stated in Bagley's affidavit.

It was stipulated, on the trial in the Circuit Court, that Turner and Wickey were, respectively, the general agent and secretary of the company at the time of making their affidavits above mentioned. It was also stipulated on the trial, that if Beall were present, he would testify, among other things, that he had no authority to employ Rich, but employed him without authority, and that Rich, if present, would testify that his employment by Beall was not approved or confirmed by appellant, or any of its officers or agents. Assuming that Beall and Rich would so testify if called as witnesses, it was a question of fact for the court to decide whether Rich was the authorized attorney of appellant, and we think that the court was fully warranted in holding that he was. Indeed, the court could not have been warranted by the evidence in finding otherwise.

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On the hypothesis that Rich was not authorized to appear for appellant, it is incomprehensible that Mr. Bagley, whom we must assume is a competent attorney, did not urge this want of authority in support of his motion to vacate the judgment, but based his motion on affidavits inconsistent with such want of authority. The record indicates that appellant is ready to assert that Rich was, or that he was not, its attorney, as its interest on the occasion may seem, in its wavering judgment, to demand. It is not claimed that Bagley, when he moved to vacate the judgment, was not its authorized attorney, and it is manifest that he was, because, otherwise, he could not have procured the affidavits of its secretary and general manager; and when appellant, acting by Bagley, its attorney, filed, in the Idaho court, the affidavit of its general manager, expressly stating that Rich was its "duly appointed attorney," it thereby ratified the act of Rich in entering its appearance in the cause, and can not now be heard to say that Rich was not "its duly appointed attorney." The withdrawal of Rich from the cause, the demurrer which he had filed to the complaint not being withdrawn, did not affect his prior entry of appellant's appearance, or defeat the jurisdiction of the court acquired by such entry of appearance. *Mason v. Abbott*, 83 Ill. 445; *Wilson v. Hilliard*, 5 Atl. Rep. (Penn.) 258.

Appellant's counsel assign as error the holding by the court as law of certain propositions; but, inasmuch as the appellees are clearly entitled to recover, the error, if any, in holding or refusing to hold propositions as law, is not ground for reversal. When it appears from the whole record that substantial justice has been done, a judgment will not be reversed because of error in the giving or refusing of instructions. *Newkirk v. Cone*, 18 Ill. 449; *Dishon v. Schorr*, 19 Ib. 59; *Schwarz v. Schwarz*, 26 Ib. 81; *New Eng., etc., Ins. Co. v. Wetmore*, 32 Ib. 223; *Penn. Co. v. Stoelke*, 104 Ib. 201, 205. This is especially in cases free from doubt, as we deem the present case.

The judgment will be affirmed.

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I. Rosin v. William Wilde, Assignee.

1. ASSIGNMENT OF ERRORS—*For the Lack of Which the Judgment Must Be Affirmed.*—For lack of an assignment of errors written upon or attached to the record, the judgment must be affirmed.

Proceedings Under the Voluntary Assignment Act.—Appeal from the County Court of Cook County; the Hon. JOHN H. BATTEN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed January 24, 1899.

D. M. MARTINDALE, attorney for appellant.

IRA W. & C. C. BUELL, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court. For lack of an assignment of errors, written upon or attached to the record, the judgment must be affirmed. *Oakland Hotel Co. v. Driscoll*, 67 Ill. App. 114, where reference to earlier cases may be found.

The assignment of errors upon the record is not a mere form that will be considered waived if not objected to, but one of substance; it is the pleading in this court of the appellant or plaintiff in error, and if this court were to inadvertently reverse a judgment in a case where no error had been assigned, the judgment of reversal would be set aside upon motion, as would be done in the trial court if a judgment for the plaintiff should there be entered without a declaration. *Ditch v. Sennott*, 116 Ill. 288; *Williston v. Fisher*, 28 Ill. 43.

It is not enough to say that in such cases the earlier practice to dismiss the appeal without costs should be followed, instead of affirming the judgment. The latest authority is to affirm. *Lancaster v. W. & S. Ry. Co.*, 132 Ill. 492; *Oakland Hotel Co. v. Driscoll*, *supra*. Affirmed.

Inland Steel Co. v. Edward P. Eastman, Adm'r.

1. **HAZARDS OF EMPLOYMENT—A Question of Law.**—When the facts are conceded, or there is no dispute as to such facts, and they show that the hazard was ordinarily incident to the employment, and not in any way imputable to lack of ordinary care on the part of the employer, then the question of hazard becomes one of law, and there is nothing for the jury to determine.

2. **SAME—Directing the Verdict Where the Risk is Incident to the Employment.**—Where reasonable minds must agree in concluding that the risk was incident to the employment, and not to be imputed to any fault of the appellant, a verdict should be directed for the defendant.

Trespass on the Case.—Death from negligent act. Trial in the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Reversed. Opinion filed January 26, 1899.

This suit was brought to recover damages for the death of appellee's intestate, which it is claimed was caused by negligence of appellant. The deceased was an employe of appellant in its rolling mills, where he received the injury which caused his death. His duties were to help in the running of hot steel rails through the rolls. It is claimed that the direct cause of the injury was the deflecting of a hot rail, which, instead of coming straight out from the rolls, bent and curved upward, and thus came in contact with the body of deceased. The first count filed, which alleged defective and unsafe condition of the press, seems to have been abandoned upon demurrer. The issues were formed and the cause tried upon the allegations of two additional counts. The first alleges negligence in running a steel rail through the rolls when the rail was not sufficiently heated to be safely run through, and that thereby the rail "curled up in the air and diverted from the course it would have followed had it been sufficiently hot," whereby the intestate was injured, etc. The second alleges two distinct charges of negligence, viz., negligence in failing to furnish a reasonably safe place to work, and that appellant

“employed so many men huddled together in a small space, and carelessly and negligently permitted a certain rail or bar, which was not in proper condition, to go through the rolls in the direction of intestate, said rail or bar curling up in the air,” whereby, etc., intestate was injured. The trial resulted in verdict and judgment for appellee.

JOHN A. POST and O. W. DYNES, attorneys for appellant.

MUNSON T. CASE, attorney for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

This appeal is disposed of upon a consideration of one question only, viz., the right of appellee to a recovery upon all the facts disclosed. No evidence was presented to sustain one allegation of negligence, contained in the second of the additional counts, viz., the charge that appellant was negligent in not providing sufficient space in which safely to work. The only evidence presented upon this point conclusively negatived any fault in this regard. Ladona, a witness for appellee, testified that “there was lots of room on the north; did not measure it, but it was large enough,” and that the space to the south was “about ten feet wide and over fifty feet long.” In answer to a question by the court as to the number of men who were working around that particular roll, this witness answered “two.”

Zone, also a witness for appellee, testified: “There were working there before he got hurt two persons; three persons were working two rolls; at the time Miniscalco was hurt there were six persons working.” Drumgoole, on behalf of appellant, testified that the space was unobstructed thirty or forty feet in front of the rolls. Brooke testified that there was a free space of forty or forty-five feet in front of the rolls. From this, the only evidence in this regard, no question is raised as to the sufficiency of the space in which the intestate worked.

There remains, then, to be considered, only the allegations of negligence in permitting a rail to be put through

the rolls, when it was of improper temperature, as alleged in the first additional count, or in improper condition, as charged in one of the allegations of the second additional count.

Two questions are presented upon the evidence, first, whether there is any evidence which would warrant a jury in finding that the deflecting of the rail was caused by any particular one of the many conditions which it appears from the evidence might have caused it; and, secondly, whether the occurrence, *i. e.*, the deflecting of the rail, was such an incident to the work for which the deceased was employed as to be conclusively an assumed hazard.

The evidence shows, without contradiction, that the deflecting of the rails from a straight course in their exit from the rolls, might be caused by any one of a number of conditions. Clark, an expert of twenty-one years' experience, called as a witness for appellee, was asked a hypothetical question ending as follows :

"What, in your judgment as a roller hand (of the experience you have testified to) is the cause of that bar or rail turning up in that way? A. I will be frank with you and say that they are too numerous to mention each one. I do not know that I could give them all, but I will name some of the important ones, however. A steel sliver on the point of the guide near one of the rails, might strike it; that is one cause; the point of the guide being broken would be another cause; the piece being chilled on the top side would be another, or coming in contact with any obstruction in the way of the pass after leaving the roll, that would be another; the roll being too slack, the top one; the set screw at the end being slack, that would be another. In mill parlance we call it 'back lash.'"

"Q. Let us see; I don't know whether you have stated whether or not the temperature, the degree of heat— A. Oh, yes; let's see; yes, that would be an important cause; if it was chilled near the end of the piece. That would be another one, provided the top was a little cold at that time; it would have a tendency to run up after it got out to a certain length, but being any longer it would naturally drop down."

Mathias, superintendent of another rolling mill, and an

expert of forty years' experience, called by appellant, testified as follows:

"Q. If you were told that this condition, as I have given it in the second preceding question, a piece of steel of the dimensions there given came out and diverged upward, would you be able to say from your experience as you have given it, what was the cause of the divergence? A. There are several causes that will cause the bar to go up.

"Q. Would you be able to say which particular one of the several might be acting upon it? A. The bar starting into the rolls may blur the point of the guide and cause the bar to start up. The bar preceding the one that was being rolled may have tipped the point of the guide up a little by lever. I have known causes of that kind. * * A piece left on the guide from the bar preceding will often do it.

"Q. Might not the condition of the heating have something to do with it? A. Not in a bar of that size."

Job, an expert witness, of forty years' experience, called by appellant, testified:

"Q. In your experience, or from your experience, are you able to state what number of causes might give rise to such deflection? A. Oh, yes, there are a great many causes; one of the common causes is the liability of a sliver from the end breaking off. All ends of rails work down in that way, and unless the ends are cut square off, these ends will become ragged and a small sliver is liable to get under the guide or guide plate, and immediately that occurs it throws the steel over, either up or sideways and in different directions. Where these slivers get under the guide, that is a very common occurrence.

"Q. Are there other causes? A. Yes, there are other causes.

"Q. A multitude of them? A. A great many causes.

"Q. Now, is it not a fact that there is a multitude of other causes, taken in the course of time, which contribute to affecting the deflections more frequently than the condition of the heating contributes to the deflection? A. Yes, sir.

"Q. And if it were true that a piece of steel had passed back and forth several times in the process of its reduction through the machine and it never deflected or curled or crooked until it was put to this last pass, would that indicate to your mind that it was deflected probably from some

Inland Steel Co. v. Eastman.

other cause than the heating? A. Yes; it would not be possible from the heating; that shows itself in the early reduction."

Drumgoole, the heater, with whom appellee's intestate was working as a helper when injured, testified that each piece of rail is put through the rolls several times in process of reduction, and that, although not sure, he thought the bar was going through the fourth time when the accident occurred. He testified further:

"Q. If a deflection occurs by reason of improper heating, in which one of these passes will it manifest itself, if you know? A. Well, the first; the first generally; if there is any flaw in the heat, the first pass will show it."

Brooke, one of the workers on the rolls, called by appellant, testified that when the accident occurred the rail was upon "about the fourth pass through the rolls," and further:

"Q. Now, supposing that the divergence in a bar passing through is due to heat, in which course—that is, we will say the bar is improperly heated—in which of the courses through, going back and forth, the earlier or the later ones, will the defect manifest itself, if you know? A. Only with the first pass."

He also testified that there were a number of causes which might result in the deflection of the rail.

The only evidence upon which a finding could be based that it was unevenness of temperature which caused the deflection, is to be found in the testimony of Ladona and Zone, who were employed in the same work with the deceased. Each of them testified that the rail was "a little cold" and "rather cold."

It is difficult to perceive from the evidence what means of knowledge Ladona possessed as to the temperature of this piece of steel when it came from the rolls. It does not appear that he saw it or had any occasion or opportunity to judge of its temperature at any time after it came from the furnace.

Zone gave no testimony which would warrant a belief that he was informed as to conditions which caused the rail

to curl upward. His statement that it was "rather cold" is given without ground or reason therefor. At the time of the accident he was about seventeen years of age. Neither Ladona nor Zone could be regarded as an expert.

In this condition of the evidence, we think that a finding by the jury to the effect that the deflection of the rail was caused by an unevenness of its temperature as alleged in the declaration, is clearly against the weight of the evidence.

But the decision of the second question, viz., whether the occurrence which resulted in the death of the intestate was an ordinary hazard incident to the employment, is determinative of the cause. Upon this question there is no conflict in the evidence. All witnesses agree that it was a matter of common occurrence for rails to thus deviate from a straight course in coming from the rolls.

Ladona testified that the rails "some days went up, but that is a few days; a few days they went up, they went wrong, and the other days they always went their own way straight."

"Q. You say some days those rails came out of the rolls straight and fell down on the floor, and sometimes came out every which way? A. Yes, sir.

"Q. Did it do that lots of times? A. It didn't always do that.

"Q. But you saw them do that lots of times? A. Yes, sir, it did it many times, but not every day."

Zone was not questioned in this behalf.

Clark, the expert called by appellee, testified:

"Q. In the best regulated machine shops, that fact is not always obviated? A. Oh no, that will occur."

Mathias testified:

"Q. Presuming that the rolls are in reasonably good condition and everything is reasonably well managed, as in the most modern and best conducted concerns of that kind, is or is not that still a common occurrence? A. Yes, sir.

"Q. Can you state from your own knowledge and experience, whether or not these divergencies of the outcoming bars, from rolls such as the ones in question that we have referred to, is one of the common facts incidental to the operation of such rolling machines on such steel bars? A. most assuredly.

“Q. I will ask you this question, Mr. Mathias: is it reasonably possible to eradicate from these machines all the conditions that will cause such deflections as you have described and testified about in your earlier answers? A. No, sir.”

Job testified that it was a “very common occurrence in rolling steel;” that it might not occur for days; that it “might occur three or four times in a half hour;” that it would depend upon the character of the material; etc.

Drumgoole testified:

“Q. When these steel rails that are reduced leave the rolls, what course do they usually take—what direction? A. Well, they vary; sometimes they will go one way, and sometimes the other; that is the way it is—you can not tell exactly what way they will go.

“Q. Is it a matter of frequent occurrence for the rails to turn up as they leave the rolls? A. Yes, sir.

“Q. How frequent? A. You can not tell when it will; sometimes they turn up and sometimes they turn down, and sometimes they go on one side or the other. The least little bit of a scale in the rolls will give them a twist to one side or the other.

“Q. And how much do they turn? A. One piece might come out straight, and the next piece will be one-sided, and the next piece might turn up.

“Q. Curl clear up? A. Yes, sir; you can't tell anything about it.”

Brooke testified that such divergence of the rails was of common occurrence, and further:

“Q. State whether or not you know of any practicable way that will prevent this divergence and make them all go in a straight line? A. I do not.”

There is no evidence whatever to warrant a finding that the task of inspecting the rails as to temperature devolved upon any one other than Drumgoole and Brooke, each of whom worked with the deceased and neither of whom sustained any relation of vice-principal or foreman; nor is there any evidence of a lack of capacity on the part of either of them, or a lack of proper inspection at the time in question.

This evidence as to the nature of the accident which caused the injury is not contradicted. It is undisputed that the

deflection of a rail, which, it is charged, was the proximate cause of the death of the intestate, was a matter of very frequent occurrence in like work.

The doctrine contended for by counsel for appellant, viz., that an employe does not assume all the risks incident to his employment, but only such as are usual, ordinary and remain so incident after the master has taken reasonable care to prevent or remove them, or, if extraordinary, such as are so obvious and expose him to danger so imminent that an ordinarily prudent and careful man would anticipate injury as so probable that in view of it he would not enter upon or remain in the employment, is undoubtedly the law. But what of its application here? Here it appears not only that the deflection of the rails, in their exit from the rolls, sometimes resulting from unevenness of temperature and sometimes from other causes, was an incident of very frequent occurrence in the work, but it appears as well, and without contradiction, that the hazard of such occurrences can not be avoided by the exercise of ordinary and reasonable caution.

The line of decisions cited by counsel to sustain the proposition that the doctrine of assumed hazard should not be made a cloak to shield the employer from consequences of his own negligence can not govern here, because they do not apply to the facts here established.

Nor can any question arise here as to the application of the rule that the servant does not necessarily assume the hazard resulting from defects of which he knows, unless he also knows, or should know, the danger involved in such defects. The difficulty of applying either of these rules arises from the fact that the evidence here shows no negligence; *i. e.*, that it appears, without contradiction, that the incident from which the peril arose was one which was not avoided by such care as is exercised by those who prudently conduct like works in the most modern and best regulated machine shops. In other words, it was a peril incident to the work and not avoidable by the exercise of such ordinary and reasonable care as the law requires of the em-

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ployer. It did not arise from any lack in the discharge by the master of his personal duty. Nor was it proper that the jury should have been permitted to determine otherwise. Ordinarily the question of whether a particular hazard is or is not an assumed risk is a question for the jury; but not if the evidence is undisputed that it was, and if there be no evidence whatever to warrant a jury in finding that it was not.

When the facts are conceded, or where there is no dispute whatever as to the facts, and they show beyond question that the hazard was ordinarily incident to the employment and not in any way imputable to lack of ordinary care on the part of the employer, then the question may become one of law. *Wabash Ry. Co. v. Brown*, 152 Ill. 484; *C. & E. I. R. R. Co. v. Driscoll*, 176 Ill. 330.

Reasonable minds could not differ, but must agree in concluding that the risk here was incident to the employment, and not to be imputed to any fault of the appellant. Hence a verdict should have been directed for the defendant, appellant here.

The judgment is reversed.

William A. Weiboldt v. The Standard Fashion Co.

1. **PRACTICE**—*Where Propositions of Law are Presented Too Late.*—Propositions of law presented after the issues are determined and judgment rendered are too late and can not be considered.

2. **SAME**—*Where Propositions Will Not be Reviewed.*—Propositions of law will not be reviewed for error by an Appellate Court when the holding or refusal of them could in no way have guided the trial court in reaching its conclusion, as, when they are submitted after the finding and judgment.

3. **CONTRACTS**—*What is a Sufficient Consideration.*—Granting to a person the exclusive right to sell goods within certain limitations, is of itself sufficient as a consideration for a contract to purchase such goods.

4. **SAME**—*What is Not in Restraint of Trade.*—A contract whereby an agency is created to sell specific articles made by a party, and none others, and to sell at a fixed price, is not in restraint of trade.

Assumpsit, on a written contract. Trial in the County Court of Cook County; the Hon. C. W. RAYMOND, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed January 26, 1899.

On October 15, 1889, a contract in writing was entered into between appellant and appellee, the substantial provisions of which are as follows: Appellee granted to appellant "the exclusive agency for the sale of its patterns, for 937-939 Milwaukee avenue in the city of Chicago, for term of five years," unless terminated as provided. "Territory: bounded east by Chicago River, south by Augusta street (657), north by Armitage avenue (1605), west by city limits, whenever Valkenaar & Jacobs terminate their agency at present location." Appellant agreed to purchase of appellee "Gazettes published by said first party to amount of \$150 per annum, at rate of six dollars per thousand single issues, and ten dollars per thousand double issues. To pay transportation on all goods, publications and patterns from Chicago. To keep on hand, for sale at retail only, during the above mentioned term, and until this contract is terminated as herein provided, six hundred dollars value in patterns at wholesale rates; to order a supply of new patterns, issued monthly. To pay one dollar at time of signing to bind this contract. To pay for all subsequent purchases on or before the fifteenth day of the month succeeding the date of shipment." Appellant also agreed "Not to assign this agency or the rights thereunder, nor transfer the same from the present location, 937-939 Milwaukee avenue, without the written consent of said first party. Not to sell nor deal in, directly nor indirectly, other patterns than those manufactured by said first party, nor allow such patterns to be sold or dealt in upon his premises. Not to purchase or receive 'Standard' patterns, except from said first party, direct, or the general agency of said first party, at Chicago; nor to sell patterns at prices other than those printed upon the labels. To permit said party of the first part or its representative, to take account of stock whenever it desires to do so. In case of failure to perform any of the clauses

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in this agreement, to forfeit all rights under this contract, and all rights to exchange or return stock, and in such event said first party may, at its option, elect to cancel this agency, and establish another agency, provided two weeks' notice in writing has first been given to said second party by said first party, and said second party does not within such time perform all the terms of this agreement," etc.

Upon the 14th of November, 1889, appellant sent the following letter to appellee:

"CHICAGO, 11-14, 1889.

Mr. F. Koewing, President Standard Fashion Co., New York.

DEAR SIR:—I have, by a profitable arrangement with the Butterick Company, resumed their agency, and herewith cancel any and all standing orders for your patterns and publications.

Respectfully yours,
W. A. WEIBOLDT."

Thereafter appellant did nothing to carry out the contract, but refused, and for a breach of the same this suit was brought. The issues were submitted to the trial court without a jury, and the trial resulted in finding and judgment for appellee.

H. W. WELLS and C. C. STILWELL, attorneys for appellant.

BOOTH & BOOTH, attorneys for appellee; W. E. HUGHES, of counsel.

MR. JUSTICE SEARS delivered the opinion of the court.

The only question presented is the sufficiency of the evidence to sustain the finding of the trial court. We can not pass upon the rulings of the court in holding or refusing to hold propositions of law presented, because the propositions of law were presented too late, and after the issues had been determined and judgment rendered.

Propositions of law will not be reviewed for error by an appellate court when the holding or refusal of them could in no way have guided the trial court in reaching its conclusions, as, when they are submitted only after finding and judgment. *Allman v. Lumsden*, 159 Ill. 219.

We have, therefore, only to inquire if the evidence sustains the finding of the trial court.

Substantially all contention in this behalf by counsel for appellant is directed to the sufficiency of the contract. It is urged, first, that the contract is without consideration; second, that it lacks mutuality; third, that the damages are speculative; fourth, that the contract is void as being in restraint of trade; fifth, that it is void as being in contravention of the statute in relation to trusts and combinations; sixth, that by its terms the contract fixes the right to declare the contract ended as the only damages for a breach; and, seventh, that the contract is void as being against public policy.

We are of opinion that no one of these grounds of objection can be maintained. As to the first, it is enough to say that the granting to appellant of the exclusive right to sell the patterns of the appellee within certain limitations, is of itself sufficient as a consideration for the undertaking by appellant. *Burch v. Hubbard*, 48 Ill. 164; *Buchanan v. International Bank*, 78 Ill. 500.

As to the second objection, it can not be maintained that there was lack of mutuality in the contract, for the same reasons which go to the question of consideration apply equally to the mutuality of obligation. The appellee did agree to something, viz., to grant the exclusive right to sell as above noted. This was sufficient in this behalf. *Brown v. Rounsavell*, 78 Ill. 589; *Standard Fashion Co. v. Ostrom*, 16 N. Y. Sup. Ct., App. Div. 220.

It is complained under the third heading that the damages are speculative. Upon careful examination of all the evidence, we are not disposed to disturb the finding of the trial judge as to the damages. There was evidence from which he could arrive at some of the pecuniary loss to appellee by reason of the breach of the contract. We can not say that his conclusion was unwarranted.

The fourth contention, viz., that the contract is in restraint of trade, because by its terms appellant agreed to sell no other patterns than those of appellee, and not to sell their patterns except at a price fixed, is not tenable as

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applied to a contract whereby an agency is created to sell specific articles made by appellee, like the patterns here. *Brown v. Rounsavell, supra.*

The same reasoning applies equally to the application of the statute relating to trusts and combinations. By its terms, the limitations put upon an agent in the sale of his principal's (the manufacturer's) goods, are not affected.

Under the sixth heading, it is urged that the terms of the contract which provide that in the event of a breach by appellant, appellee may declare it canceled, operate to determine the damages and the only damages which can be recovered for such breach. The argument is without merit. The contract, while it provides that appellee may, in certain events, terminate the agency and engage another agent, does not purport to declare what shall be liquidated damages for a failure of appellant to carry out its terms.

The last of these grounds of objection is that the contract is void because by one of its provisions appellee undertakes to save appellant harmless from any damages which may result from a breach of another and different contract, theretofore made with another company. This ground of objection was not presented to the consideration of the court below, which would be a sufficient reason for refusing to consider it here. But the validity of the contract with the Butterick Company is not here involved, nor could it be determined from the evidence; nor is any enforcement sought or had of the provisions of this contract to indemnify the appellant for any loss consequent to a disregard of the terms of the Butterick contract.

The judgment is affirmed.

Chicago City Ry. Co. v. Sophia Anderson.

1. PERSONAL INJURIES—*Unavoidable Accident.*—The question as to whether an injury was the result of an unavoidable accident, occasioned by an outside force for which the defendant was in no manner responsible, is a question of fact for the jury.

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2. **SAME—Compensation for Inability to Work at One's Ordinary Employment—Allegation and Proofs.**—In order to recover compensation in a personal injury case for inability to work at the plaintiff's ordinary employment, all that is necessary is a general averment of such inability, caused by the injury, and consequent loss and damage, and proof of such employment, and his ordinary wages or earnings, is admissible under such general averment.

3. **SAME—Loss of Profits, etc.—Allegations and Proofs.**—When it is sought to recover for loss of profits or earnings that depend upon the performance of a special contract these special and particular damages, and the facts on which they are based, must be averred in the declaration.

4. **DAMAGES—Mental Pain and Suffering, When Too Remote.**—The mental pain that comes from the contemplation of a maimed body and the humiliation of going through life in a crippled condition, is too remote to be considered an element of damage.

5. **SAME—Mental Pain and Suffering, When an Element of Damage.**—The mental pain that may be considered and allowed for, in cases of personal injuries, is such as is the direct result of the physical pain suffered. Mental pain is always an attendant upon severe physical pain—such is the relation of mind and body—and the mental pain that is the direct and necessary result of the physical pain, but not otherwise, is a proper element of damages in personal injury cases.

6. **EXCESSIVE DAMAGES—When \$7,000 is.**—A judgment of \$7,000, in favor of a woman fifty-nine years old, who worked about half of the time nursing, at wages of from \$12 to \$15 per week, and the rest of the time in taking care of her home, her youngest child being seventeen and her eldest thirty-six years of age—her injuries, except temporarily, being wholly of the subjective sort—is so excessive as to require a reversal upon that ground alone.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court at the March term, 1898. Reversed and remanded, unless a remittitur is entered, etc. Opinion filed January 24, 1899.

WILLIAM J. HYNES and MARCUS KAVANAGH, attorneys for appellant.

WILLIAM C. SCHAEFER, GEORGE W. PLUMMER and WHARTON PLUMMER, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The appellee was riding as a passenger and sat in the front end or northeast corner of one of appellant's electric

cars. When the car was attempting to pass a wagon loaded with lumber, going in the same direction, the lumber projecting some feet—six or seven feet, as testified by one witness—behind the end of the wagon, it ran into the lumber, some pieces of which broke through and into the car and hit appellee in the back and caused the injuries for which she sued and recovered.

It would be useless to review the testimony in detail. There is no question made that appellee was not in the exercise of all due and proper care for her own safety.

Whether the car was negligently operated by appellant's servants, as claimed by the appellee, or whether the collision was a mere unavoidable accident, occasioned by a sudden shifting of the wagon and load, from a safe position to be passed by the car, into the way of the car, so suddenly and unexpectedly as to make of the collision an unforeseen and unavoidable accident, occasioned by an outside force beyond the control and avoidance of the appellant, and for which it was in no manner negligent or responsible, were matters which were fully placed before the jury by the evidence, and we regard their conclusion as clearly justifiable, if not absolutely right.

Appellant argues that the allegation of the declaration, that because of the injuries received, appellee "was and is hindered and prevented from transacting and attending to her business and affairs," is insufficient to admit evidence of appellee's frequent employment as nurse to women in confinement, and her earnings in such capacity.

The rule in this State is "that in order to recover compensation for inability to work at the plaintiff's ordinary and usual employment or business, all that is necessary in the declaration is the general averment of such inability, caused by the injury, and consequent loss and damage, and that proof of his particular employment or business and of his ordinary wages or earnings therein is admissible in evidence under such general averment; but that when it is sought to recover for loss of profits or earnings that depend upon the performance of a special contract or engagement,

then these special and particular damages, and the facts on which they are based, must be set out in the declaration." C. & E. R. R. Co. v. Meech, 163 Ill. 305.

The allegation was sufficient and the evidence properly admitted.

Objection is made to appellee's instruction numbered 14, because thereby the jury were told that in estimating her damages they might, in connection with her personal injuries, take into consideration her pain and suffering, if any are proven, undergone by her in consequence of her injuries, if any are proved. And the criticism indulged in is that thereby the jury were permitted to allow damages for any mental pain and suffering suffered by her. The mental pain that comes from the contemplation of a maimed body, and the humiliation of going through life in a crippled condition, is too remote to be considered an element of damage. The mental pain that may be considered and allowed for, in this class of cases, is such as is the direct result or concomitant of the physical pain suffered. Mental pain is always an attendant upon severe physical pain—such is the relation of mind and body—and the mental pain that is the direct and necessary result of the physical pain, but not otherwise, is a proper element of damages in personal injury cases. C. C. Ry. Co. v. Canevin, 72 Ill. App. 81.

The instruction violated no rule of law regarding the element of pain, either mental or physical, suffered by an injured person.

We feel justified in omitting to discuss the numerous errors claimed concerning other instructions that were given and refused, upon the ground that they present no new or interesting questions, and, as we consider, were properly acted upon by the trial judge.

The appellee recovered a verdict and judgment for \$7,000. This, we believe, was so excessive as to require a reversal upon that ground alone, unless a remittitur be entered.

The appellee was fifty-nine years old. She worked about half of the time in nursing, at wages of from \$12 to \$15 per week, and the rest of the time her work was that of

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taking care of her own home, her youngest child being seventeen and her eldest thirty-six years of age. Her injuries, except temporarily, were wholly of the subjective sort, and though we were to accept as true her present partial incapacity in consequence of them, still, measured by the only standard we are permitted to employ, that of compensation, she ought not to have recovered more than one-half the amount of the verdict that was returned.

If appellee will file in this court, within ten days, a remittitur of one-half the recovery below, the judgment will be affirmed for the balance, at her costs, otherwise it will be reversed and the cause remanded.

Charles W. Lasher v. Samuel K. Colton, Adm'r.

1. ~~WITNESSES~~—*Unimpeached Credibility, etc.*—It is not true, as a matter of law, that unimpeached witnesses are of equal credibility. Such credibility is always a question of fact.

2. ~~INSTRUCTIONS~~—*When to be Accurate.*—When the question at issue is one of fact, and close, upon the evidence, the jury should be instructed with care upon the law applicable to the proofs.

Assumpsit, for services of an architect. Trial in the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed January 24, 1899.

WILLIAM R. EVERETT, attorney for appellant.

WILSON & ZOOK, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This appeal is from the judgment rendered in a suit begun below by appellee's intestate, A. M. F. Colton, to recover for services claimed to have been rendered by him as an architect for appellant.

The appearance of appellee was entered in this court, but

no briefs have been filed upon his behalf, and it has devolved upon us, without assistance from him, to determine whether or not his judgment may stand.

The defense to the action at the trial was two-fold, a special contract, and a partnership between the original plaintiff and his son, the appellee, in his individual capacity, and there was evidence tending to sustain each defense; and we may add that, especially as to the latter, the question of fact, under the evidence, was a very close one. The jury should, therefore, have been instructed with care, if at all, upon the law applicable to the evidence.

The first and second instructions given on behalf of appellee were as follows:

“ 1. If the jury believe from the evidence in this case that A. M. F. Colton performed the services as architect and superintendent for defendant, and claimed on behalf of the estate, then the jury must find for the plaintiff and assess his damages at such sum as the evidence shows the services were reasonably worth at that time less the sum of \$650, admitted to have been paid on account; unless the jury further believe from the evidence that a definite agreement was made between said A. M. F. Colton and the defendant Lasher, as to Colton's compensation for his services as such architect and superintendent; and the court instructs the jury that the burden of proving such agreement for a definite compensation is on the defendant, and he must show it by a preponderance of the evidence.”

“ 2. The jury are instructed that under the written contracts, and other evidence offered in this case, A. M. F. Colton could not, nor can his estate now, be held responsible for any imperfections found in the materials furnished or work performed under any such contracts, unless such imperfections were fraudulently accepted by said Colton; and the jury are instructed that no such fraud was shown by the evidence in this case.”

The insistence of appellant, from the beginning of the suit, was that the work was done by the partnership, A. M. F. Colton & Son, and not by A. M. F. Colton, and as already said, the evidence in that regard was conflicting and very close. It was, therefore, harmful error to ignore the question of whether the work was done by the partnership.

And it was particularly calculated to impress the jury that the court did not regard the question of partnership as being involved in the case, when we consider the contrary rulings of the court upon that question, because of the absence of a special plea of non-joinder.

The second instruction, stating, in effect, it was only in cases of a fraudulent acceptance of imperfect materials or work that the architect would be responsible, was bad.

A negligent disregard of an architect's duty in such respects would be as effectual a defense as a fraudulent one, and it was quite too severe an application of the law to say that he was responsible only for actual fraud committed by him. And the instruction should have stated the law correctly, because of one aspect of the defense that the evidence tended to show, of negligence by the architect concerning the materials and work furnished and done by one contractor, the Interior Building Company.

The instruction, likewise, ignored the defense, already sufficiently spoken of, concerning the non-joinder in the suit of the "son," whom the evidence tended strongly to show was a partner with the sole plaintiff, A. M. F. Colton, in the work.

We do not see that the errors mentioned were cured by any other instruction; nor do we regard the fact that certain special interrogatories propounded to the jury, concerning matters omitted in the instructions, would in any respect obviate the necessity of proper instructions.

If there be other errors in the record than we have pointed out, they are such as may be readily seen from what we have said, and easily avoided upon another trial.

Appellant submits the question if there was not error in the refusal of one of his requested instructions, and we will take time to explain that there was not. The refused instruction was as follows :

"The court instructs the jury that the burden of proof in this case is upon the plaintiff, and any matter asserted by one party and denied by the other can only be proved in law by preponderance of the evidence, and in this case, if the jury find from the evidence that the plaintiff has proved

the alleged contract by only one of the witnesses, and that the contract has been denied by one witness of equal credibility and means of knowledge, then, as a matter of law, such contract has not been proved, unless in the minds of the jury there have been facts or circumstances proved corroborating the plaintiff's witnesses sufficient to outweigh the testimony on the part of the defendant."

The legal principle asserted in the foregoing, that unimpeached witnesses are of equal credibility, and when equally opposed to one another the affirmative side of the case must fail, would be correct, if *McFarland v. The People*, 72 Ill. 368, where it was upheld, had not been overruled. After that decision, a former judge of this court—Mr. Justice Waterman—when sitting in the Criminal Court, declined to follow it. Thereupon the question arose once more in the Supreme Court (*Johnson v. The People*, 140 Ill. 350), where Mr. Justice Schofield, who wrote the opinion in the *McFarland* case, again wrote upon the question, and, with the frankness and fairness characteristic of a great mind, condemned his earlier opinion, and the court overruled the *McFarland* case. Subsequently, this court, in *Hanke v. Cobiskey*, 57 Ill. App. 267, following the *Johnson* case, held, "it is not true, as a matter of law, that unimpeached witnesses are of equal credibility, but the credibility of witnesses is always a question of fact."

We observe no other matter needing mention, and therefore, first regretting that the appellee did not see fit to aid us by filing briefs here, to his possible advantage, we reverse the judgment and remand the cause for the errors pointed out. Reversed and remanded.

Marshall Field et al. v. Stuart W. French.

1. **LIMITATIONS — As to Additional Counts.**—Where the original counts of a declaration state no cause of action, and there is a re-statement by additional counts, such additional counts can not stand as against a plea of the statute of limitations, in cases where they are filed after the statutory period has expired.

2. **NEGLIGENCE—Contractor and Third Persons.**—A person who puts

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a passenger elevator in a building occupied by a merchant, for the accommodation of his customers, owes a duty to the merchant, so far as the construction of the elevator is concerned, but not to the customers.

3. JUDGMENTS—*When Erroneous as to All Defendants.*—A judgment erroneous as to one defendant is erroneous as to all.

4. PERSONAL INJURIES—*The Result of Hidden Defects, Question of Fact.*—Whether an injury is the result of a hidden defect in machinery of an elevator, and could not have been discovered by the exercise of the highest degree of care, and whether the operators of such elevator did all that human care, vigilance and foresight could reasonably do, under the circumstances, to guard against accidents, are questions of fact for the jury.

5. INSTRUCTIONS—*As to Joint Liability Where No Joint Action is Shown.*—Where there is no evidence showing that one of several joint defendants is liable under the declaration, an instruction which allows a verdict on the theory of joint operation, is erroneous.

6. SAME—*Shifting the Burden of Proof—Prima Facie Case.*—The plaintiff's right to recover must be confined to the grounds stated in his declaration, and an instruction which requires him to make out a *prima facie* case only, and then requires the defendant to meet all possible cases which would entitle the plaintiff to recover whether he alleges or proves them, is not the law.

7. BURDEN OF PROOF—*The General Rule.*—The general rule is that when the plaintiff makes affirmative allegations of negligence, and the defendants plead the general issue, the burden is on the plaintiff all through the case to prove the specific negligence alleged, by a preponderance of the evidence, and he can not recover if the defendants' evidence is such as to evenly balance his own.

8. WORDS AND PHRASES—*Prima Facie Case and Burden of Proof.*—All that is meant by the phrase "the plaintiff has made a *prima facie* case" is, that there is a necessity of evidence to answer, or it will prevail; but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and this burden remains throughout the trial.

9. CARRIERS OF PASSENGERS—*Persons Operating Elevators Are.*—Parties operating elevators in buildings for raising and lowering persons from one floor to another are carriers of passengers, and the same rules applicable to other carriers of passengers are applicable to them.

10. SAME—*Degree of Care to be Exercised by.*—As such common carriers they must exercise the highest degree of human care, vigilance and foresight which is reasonable under the circumstances and in view of the character of the mode of conveyance adopted, reasonably to guard against accidents, etc.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendants. Heard in this

court at the October term, 1898. Reversed and remanded. Mr. Justice SEARS dissenting. Opinion filed January 26, 1899.

STATEMENT OF CASE.

Marshall Field was the owner of certain real estate at Wabash avenue and Washington street, Chicago, and a ten story new building thereon, and made a contract with the Crane Elevator Company to construct therein thirteen elevators for the carriage of passengers, and two freight elevators, which contract had been substantially if not entirely completed, when French, the appellee, was injured by the falling of one of the passenger elevators, December 16, 1893.

Marshall Field & Co., as copartners, composed of all the appellants except the Elevator Company, were lessees of the building and premises, and occupied and used the building as a retail dry goods store at and before the time of appellee's injury.

The original declaration, which was filed September 6, 1894, is in two counts. The first count charges, in substance, that plaintiff was a customer at the store of defendants other than the Elevator Company, and while a passenger on one of their elevators, operated by the defendants other than the Elevator Company, and being carried from one of the upper stories down to the first floor of the building, while exercising due care for his own safety, was injured by the negligence of said defendants in using and operating said elevator and permitting the same to be used and operated while it was in an unsafe and unfit condition to be used for the purpose of carrying passengers, and alleging that the stand-pipe of the elevator, by means of which the car of the elevator was raised, lowered and operated, burst, and by reason thereof the car in which plaintiff was being carried dropped with great violence to the bottom of the elevator shaft.

The second count alleges, in substance, that Marshall Field owned the building, and had leased the same to *defendants other than the Elevator Company*, to carry on their business of a retail dry goods store, which defendants

were in possession of for said purpose; that Field had prior thereto made a contract with the elevator company to build and place in the store an elevator with car to be used in connection with the building, to carry passengers, customers of the store, from one floor to another; that the elevator company had completed, or partially completed, the elevator and car, but it had not been accepted by the inspector of elevators connected with the building department of the city of Chicago, in pursuance of the laws and ordinances of the city, nor by Field, and that it was the duty of said defendants, and each of them, not to use said elevator or car for carrying of passengers, customers of said store, when passing from one floor of said building to another, until said elevator or car had been duly and properly accepted by the said building department of the city of Chicago and the defendant Marshall Field; but that on the 16th of December, 1893, said defendants, before said elevator had been duly and properly accepted as aforesaid, were using and operating the same in said building for the purpose of carrying passengers, customers of said store, and while the plaintiff was a customer of said store and without any knowledge or notice of the condition of said elevator or of above facts, the defendants other than the Crane Elevator Company received and took plaintiff into the car of said elevator, to be safely carried from the upper to the first floor, and while said elevator with the plaintiff was so descending, by reason of the carelessness and negligence with which said elevator was built and constructed, and by reason of the carelessness and negligence of the defendants other than the Crane Elevator Company in using and operating said elevator car for the purposes aforesaid, before the same had been duly and properly accepted as aforesaid, and while the plaintiff was using due care, when said elevator had reached the point at or above the second floor of said building, the stand-pipe (by means of which said elevator was operated and raised and lowered) broke, and by reason thereof said car with the plaintiff dropped to the bottom of the shaft wherein said car was operated; whereby the

plaintiff was thrown down against said car, the lower part of his right leg or ankle was broken, etc. No city ordinance is set out by this count.

September 14, 1896, plaintiff, by agreement of parties, filed three additional counts, the first of which charges, in substance, that defendants were in possession of and operating said elevator, and negligence in operating it when the cylinder and cylinder heads were in an unsafe and dangerous condition; the second of which alleges, in substance, that defendants operated the elevator, and were negligent in its operation, with the pipes, etc., being untested and being of imperfect, unsound and defective material, which caused the elevator to suddenly drop to the basement, etc.; and the third of which additional counts alleges, in substance, that defendants were negligent in operating the elevator, carrying passengers before it had been properly tested to ascertain whether its different parts and appliances were properly constructed, and that the materials used were safe and proper; that the stand-pipe burst and gave way, and the elevator dropped, etc., whereby, etc.

All the defendants pleaded the general issue to the original and additional counts, and thereafter, by leave of the court, the Elevator Company filed a plea of the statute of limitations to each of the additional counts. A demurrer to this plea was sustained, and a trial before the court and a jury resulted in a verdict of guilty as to all the defendants, and damages \$10,000. From this verdict plaintiff remitted \$3,000, the several motions for new trial of defendants were overruled, and judgment entered, from which this appeal is taken.

By inadvertence, so appellees' counsel state in their brief, the case was not dismissed as to the first and second counts of the original declaration, though they were practically abandoned at the trial, and no claim was made to recover under them.

The evidence shows that plaintiff went to the store of Field & Co., to purchase Christmas presents; that he reached the fourth floor of the building, and started to return to the

second floor by the elevator, which contained twelve or fifteen persons; that it descended, and near the top of the door of the second floor it suddenly fell to the basement with great force and violence, rebounded and then settled down again; that the force of the fall caused a fracture of the bones of his leg near the right ankle joint, nearly what is called a Pott's fracture, the bones being to some extent crushed, and a slight injury to his left leg near the knee; that the injury was very painful, was somewhat slow in healing, and rendered him unable to attend to business until August, 1894.

The evidence also shows that the contract under which the elevator in question, with others in the same building, was constructed, was made August 3, 1892, and among other things that the elevators were to be completed by March 31, 1893, and that the specifications provide that the elevators shall be high pressure (750 pounds) hydraulic passenger elevators, with iron guideposts, and other details of materials and workmanship not necessary to be enumerated; and also that the Crane Elevator Company's patent safety governor shall be attached to the cage, and that the operation of the safety governor is such that it is impossible for the car to fall from any cause; also that "every part of the elevators shall be erected in a substantial manner, and are guaranteed to be free from defect in material and in workmanship;" that the elevator in question was completed and put into service, carrying passengers in August or early in September, 1893, before the accident; that from the time it was put into service up to the time of the injury to plaintiff, the clear preponderance of the evidence is that the elevator was operated in connection with Field & Co.'s business by the employes of that firm, under its supervision and direction, in the carrying of passengers.

There is no evidence from which it could be found that the Crane Elevator Company had or exercised any control in the use or operation of the elevator in question after it was put into service in August or September, 1893. The evidence shows that immediately after the elevator had

fallen, there was a great rush of water from the elevator cylinder above to the car below, and later, it was ascertained that the bottom flange of the cylinder, which was made of semi-cast steel, was cracked through in two places, about twelve inches apart, but between, not in, the bolt-holes, through which it was made fast to the cylinder, and that these cracks caused the water to rush out and the elevator to fall; that the semi-steel of which this flange was made, was the usual material from which such flanges were constructed; that the flange was three by three and one-half inches, with twelve inches inside diameter; that prior to its use in the construction of this elevator, this flange had been subjected to a test by a hydraulic pump at a pressure of 1,500 pounds to the square inch; and also, after the elevator was constructed and ready for use, the flange and cylinder were again subjected to a like test, but showed no flaws nor defects, and that no flaw nor defect upon the outside of the flange, upon examination immediately after the accident by the vice-president and general manager of the Elevator Company, was discovered. This appears to have been a usual and ordinary test for an elevator subject to the pressure to which this one was ordinarily subjected, to wit, 750 pounds to the square inch. The broken flange was removed and the elevator repaired by the Crane Elevator Company, but the flange has been lost. The expert evidence shows that the only way in which the cracking or giving way of the flange can be reasonably accounted for, is that there was some hidden flaw or defect in it.

It further appears from the evidence that the Elevator Company, when the contract was made and the elevator constructed, was one of the most skillful and reliable firms in elevator manufacture in the United States; that it was competent to do the work called for by its contract, and that neither of the other defendants than the Elevator Company had any control over the details of the work of construction or of the materials used therein.

Besides the tests of hydraulic pressure, the elevator, before its use in carrying passengers, was also tested by the Eleva-

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tor Company as to its safety appliances, by loading it with pig iron and allowing it to drop. It was found that they operated properly and stopped the elevator at a speed of about 400 feet per minute, and it was ordinarily run at 250 to 300 feet per minute.

There is a question in the evidence as to whether the safety appliances operated at the time of the accident. No tests of any kind of the elevator were made at any time after it was put in use up to the time of the accident. The evidence tends to show that the safety appliances were not called into operation, for the reason that the car, in falling, did not reach a speed sufficient to throw out the governor balls, and thereby operate the safety appliances.

At the close of the plaintiff's evidence, and also at the close of all the evidence, the defendants severally asked written instructions by the court directing a verdict of not guilty, which instructions were refused.

The following instructions, among others, were given for plaintiff, viz. :

"III. The court instructs the jury that if they believe from the evidence that the plaintiff has made out a case, as charged in the declaration, or either count thereof, and that the defendant copartnership and the defendant corporation, at the time in question, were jointly concerned in the operation of the elevator in question and its appliances and connections, or at the time of said accident were jointly operating the same, then said defendants are jointly liable for the injuries which the jury may believe from the evidence the plaintiff has sustained from the fall of said elevator. On the other hand, if the jury believe from the evidence that the defendant corporation constructed the elevator and its appliances in question under a contract with Marshall Field, one of the defendants, and a member of the firm of Marshall Field & Co., and before the entire and satisfactory completion thereof consented to the use of said elevator by said firm of Marshall Field & Co., and that said firm used and operated the same pending the full completion and acceptance thereof under said contract, then the defendant corporation, as well as said defendants constituting said firm of Marshall Field & Co., are jointly responsible for the injuries sustained by the said plaintiff while using

said elevator, as charged in the different counts in the declaration herein.

"IV. The court further instructs the jury that the plaintiff has made out a *prima facie* case when he has proved, if the jury believe from the evidence that he has so proved, that at the time of the accident in question he was in the exercise of due and ordinary care, and without any fault on his part, was injured by the falling of the elevator cab in question; that is to say, if the jury believe from the evidence that the defendants were in the possession of and operating the elevator in question, as alleged in the declaration, at the time of the accident, and that the plaintiff, without any fault on his part, entered said elevator cab, and that while standing in said cab, in the exercise of ordinary care for his own safety, the said cab, when descending from one of the upper stories of said building, was precipitated or dropped to the bottom of the elevator shaft, striking the bottom thereof with such force as to injure the plaintiff in the manner described by the evidence, then the jury are instructed that the burden of proof is upon the said defendants to show if they can, by a preponderance of the evidence, that said accident was without any fault or negligence on their part."

"VI. The jury are instructed that if they believe from the evidence that the plaintiff was injured by the falling of the elevator in question, in which he was a passenger, and was thereby injured without fault on his part, he thereby makes out a *prima facie* case of negligence against such of the defendants as the jury may believe from the evidence were operating or in control of the elevator, and places upon them the burden of proving, by a preponderance of the evidence, that the accident resulted from a cause which could not have been foreseen or guarded against by the highest degree of human care, skill and foresight practicable."

"VIII. The court further instructs the jury that if they believe from the evidence, that, at the time of the accident in question, the elevator was being used for the carriage of persons to and from the different floors in the said building occupied by the firm of Marshall Field & Co., then the law is that all persons operating, or responsible for the operation of said elevator, are liable to the same extent as common carriers of passengers, and, as such, it was their duty to do all that human care and vigilance and foresight could reasonably do under the circumstances, and in view of the character and of the mode of conveyance adopted, reasonably to guard against accidents and consequential injuries; that the law is, that while a carrier of passengers in elevators

like the one in question, is not an insurer of the absolute safety of such passengers, nevertheless a carrier of passengers does, in legal contemplation, undertake to exercise the highest degree of care to secure the safety of passengers, and, as such, is responsible for the slightest negligence resulting in injury to a passenger, if the passenger, at the time of the injury, is in the exercise of ordinary care for his own safety; and the jury are further instructed that the care thus required by law of all carriers of passengers, applies to the safe and the proper construction and equipment of all of the machinery and appliances used in connection with the operation of the particular conveyance adopted.

“IX. The court further instructs the jury that if they believe from the evidence that the plaintiff was injured while descending from the fourth to the second floor of the building occupied by the firm of Marshall Field & Co., at the time of the accident, in one of the elevators then in use by said firm, and in the manner and form as charged by the declaration, or either of the counts thereof, and that under the evidence and the law as given to you by the court he is entitled to recover at your hands, then in estimating the plaintiff's damages the jury may take into consideration the expense reasonably incurred by him in endeavoring to be cured of such injuries, his pecuniary loss, if any, shown by the evidence, his present physical condition and ability to carry on the employment or business in which he was engaged at the time of said accident and the prospect of his ultimate recovery, including such damages for pain and suffering endured by him while recovering from such injuries as the jury may believe from the evidence he is entitled to from all the facts and circumstances in the case.

“X. The jury are instructed that any and all evidence introduced in this case, of events occurring after the date of the accident in question, should be considered by them solely in determining the relationship, if any existing, between the several defendants with reference to the operation of the elevator in question at the time of the accident, and in determining what, if anything, the defendants, or any of them, had to do with the operation of said elevator at the time of the accident.

“And the jury are further instructed that the above purpose or purposes are the only ones for which said evidence was introduced in this case, and that they, the jury, should disregard said evidence of events occurring after the accident in question in considering any and all other questions in this case.”

HAMLIN, SCOTT & LORD and FRANK P. LEFFINGWELL,
attorneys for appellants.

D. J. SCHUYLER and FRANK J. SMITH, attorneys for
appellee.

MR. PRESIDING JUSTICE WINDES delivered the opinion of
the court.

The first question is as to whether the demurrer to the plea of the statute of limitations was properly sustained. The first count of the original declaration fails to state any duty of the Crane Elevator Company to appellee, or any facts from which it can be said the Elevator Company owed any duty to appellee; nor does it state any negligence on the part of the Elevator Company. It fails to state that the Elevator Company used or operated the elevator. It therefore does not state a cause of action against the Crane Elevator Company. The second count fails to state facts which in law show any negligence of the Elevator Company of which the appellee can avail himself. It alleges that when the injury occurred, the appellants other than the Elevator Company, were using and operating the elevator, and the only negligence charged as against the Elevator Company in this count is the "negligence with which said elevator was built and constructed." This can not avail appellee as against the Elevator Company. There is no fact alleged showing privity between the appellee and the Elevator Company, without which there can be no liability of the Elevator Company in this case to appellee for alleged negligent construction of the elevator. The duty of the Elevator Company was to Field, not to the appellee, so far as concerns negligent construction. Wharton on Negli., Sec. 438; Curtin v. Somerset, 140 Pa. St. 76, and cases cited; Savings Bank v. Ward, 100 U. S. 195, 207; Ziemann v. Kieckhefer Elev. Mfg. Co., 63 N. W. (Wis.) 1021; Winterbottom v. Wright, 10 Mees. & W. 115; Losee v. Clute, 51 N. Y. 494.

Mr. Wharton states the reason for the rule that a con-

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tractor is not liable to third parties for negligence, sometimes given, is "that otherwise there would be no end to suits; but a better ground is that there is no causal connection between the injury and the contractor's negligence."

In the Curtin case, *supra*, the court held that a contractor who erected a hotel building was not liable to a guest of the hotel for injuries received because of improper material used and defective construction of the hotel, and said: "If a contractor who erects a house, who builds a bridge or performs any other work—a manufacturer who constructs a boiler, piece of machinery, or a steamship, owes a duty to the whole world that his work or his machine or his steamship shall contain no hidden defect, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions. It is safer and wiser to confine such liabilities to the parties immediately concerned."

In the Zieman case, *supra*, the court held that an elevator manufacturing corporation was not liable to an employe of its vendee of an elevator who was injured by reason of a defect in the elevator while it was on trial and under the supervision of the vendor, the employe being engaged in work of his employer near the elevator when he was injured. The court say: "If this action could be maintained upon the allegations of negligent and improper construction of the elevator, it would follow that any one actually using it and receiving injury in consequence—a much stronger case than the present—might maintain an action against the manufacturer. This would be to introduce a rule which, we think, is not sustained by authority, and might lead to serious consequences." The same principle is recognized in *Gibson v. Leonard*, 143 Ill. 189, and the general rule that the contractor is not liable to third persons for negligent construction is stated to be well established in *Empire Machinery Co. v. Brady*, 164 Ill. 58.

Both these counts, then, showing no cause of action against the Crane Elevator Company, the additional counts can not stand as against the plea of the statute of limita-

tions, they being filed more than two years after the plaintiff's cause of action accrued. There can be no re-statement of a cause of action by the additional counts, as no cause of action was stated as against the Elevator Company in the original counts. *Eylenfeldt v. Ill. Steel Co.*, 165 Ill. 189.

We have considered the contention of appellee's counsel, that the plea of the statute of limitations was improvidently filed, and that the Elevator Company waived the time of filing the additional counts, and are of opinion it is not tenable. It was therefore error to sustain the demurrer to the plea of the statute of limitations of the Crane Elevator Company to the three additional counts.

But if this second count was good as to the Elevator Company, it proceeds upon the theory of joint operation of the elevator by the other appellants and the Elevator Company, and the proof fails to support this allegation. For this reason, the judgment being against the Elevator Company and all the other defendants, the judgment must be reversed. If it is erroneous as to one, it is erroneous as to all. *W. C. Street R. R. Co. v. Morrison & Co.*, 160 Ill. 295, and cases cited; *Met. W. S. El'd R. R. Co. v. Strasburg*, 79 Ill. App. 136.

The contention is made on behalf of Field & Co. that they can not be held for the injury, as they claim the evidence shows that the immediate cause of appellee's injury was a defect in the flange, which was hidden and could not have been discovered by the exercise of the highest degree of care on their part; that the elevator was built by the Elevator Company, an independent and competent contractor, for Marshall Field; that it had been completed, accepted and in use by Field & Co. long before the accident.

In so far as Marshall Field may be liable as owner, this may be conceded; but it can not be said, as matter of law, under the evidence, that the immediate cause of appellee's injury was a defect in the flange. That was a question for the jury (*Pullman Palace Car Co. v. Laack*, 143 Ill. 259, and cases cited), and the evidence tends to show that the safety appliances which the Elevator Company guaranteed by its

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contract with Field were such that it was impossible for the car to fall from any cause, failed to operate; that this was the cause of appellee's injury; that Field & Co. had notice that the safety appliances were a new design, and there is no evidence that there was any test made of the safety appliances after the elevator was put into service, some three months before the accident. There is expert evidence to the effect that a test should be made every other week of the safety appliances to ascertain whether they were in good working order.

There is also evidence which tends to show that the hydraulic tests (1,500 pounds pressure) to which the flange was subjected were calculated to strain the metal at weak points and not develop the weakness at once; that such tests should be, and in 1893 usually were, one-half more than the intended pressure to be carried (in this case 1,125 pounds), then leave the pressure on for a number of hours and rap and hammer on the metal to see that no part gives out.

In *Hartford Dep. Co. v. Sollitt*, 172 Ill. 225, the Supreme Court held that persons operating elevators are carriers of passengers, and the same rules applicable to other carriers of passengers are applicable to those operating elevators for raising and lowering persons from one floor to another in buildings. These rules require that the carrier should "do all that human care, vigilance and foresight can reasonably do under the circumstances, and in view of the character of the mode of conveyance adopted, reasonably to guard against accidents and consequential injuries," and if they do not do so they are responsible for all consequences which flow from such neglect. *C. & A. R. R. Co. v. Byrum*, 153 Ill. 135; *C. & A. R. R. Co. v. Arnol*, 144 Ill. 272.

It may, therefore, well be said, in view of the law and this evidence, there was a question for the jury as to whether Field & Co., in relying upon the tests made by the Elevator Company as to the sufficiency of the flange and the safety appliances, did all that human care, vigilance and foresight could reasonably do under the circumstances, in view of the

mode of conveyance, reasonably to guard against accidents. Fair-minded and honest men might reasonably differ on this matter.

From what has been said with regard to the sufficiency of the two counts in the original declaration as to the Elevator Company, and the evidence as to the joint operation by the Elevator Company and the other defendants of the elevator, it follows that the third instruction for the plaintiff was erroneous, because it allows a verdict on either count of the declaration and on the theory of joint operation, of which there was no evidence. The latter part of the instruction also tells the jury, in effect, that all defendants are liable for plaintiff's injuries, without reference to any act of negligence.

The fourth instruction for appellee is improper, because it also proceeds upon the theory of joint operation of the elevator by the Elevator Company and the other defendants, and also because, while all the counts of the declaration allege specific grounds of negligence, this instruction says that when the plaintiff has made a *prima facie* case, "the burden of proof is upon the defendants to show, if they can, by a preponderance of the evidence, that said accident was without any fault or negligence on their part."

The plaintiff's right to recover must be confined to the grounds stated in his declaration, but this instruction only requires plaintiff to make out a *prima facie* case, and then says, in effect, defendants must meet all possible cases which would entitle the plaintiff to recover without reference to whether he alleged or proved them. This is not the law. *C. & A. R. R. Co. v. Rayburn*, 153 Ill. 290; *W. C. St. R. R. Co. v. Martin*, 154 Ill. 523; *C., B. & Q. R. R. Co. v. Levy*, 160 Ill. 385, and cases cited.

The point is not made, but we think that as there may be another trial of this case we should state that there is a question as to whether this instruction is erroneous because it requires the defendants, after the plaintiff has made out a *prima facie* case, to prove their defense by a preponderance of the evidence. It does not appear to have been

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directly decided in this State. In civil cases, unless the state of the pleadings require it, as, if the defendant has pleaded payment, release, set-off or justification, the defense only has to meet the plaintiff's case, not by a preponderance of evidence, but by evidence which will evenly balance the plaintiff's evidence. The general rule is that when the plaintiff makes affirmative allegations, as in this case, of negligence of the defendants, and the defendants plead the general issue, the burden is on the plaintiff all through the case to establish his case—that is, prove the specific negligence alleged—by a preponderance of the evidence, and he can not recover if the defendants' evidence is such as to evenly balance that of the plaintiff. 1 Jones on Evidence, Secs. 174 to 176, 181 and 182; 1 Wharton on Evidence, Sec. 357; 5 Amer. & Eng. Ency. of Law, 22; Heinemann v. Heard, 62 N. Y. 455; Scott v. Wood, 81 Calif. 400.

In speaking of the burden of proof being shifted when the plaintiff has made a *prima facie* case, Mr. Jones (1 Jones on Evid., Sec. 175), says: "All that is meant by this is, that there is a necessity of evidence to answer the *prima facie* case, or it will prevail; but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue; and this burden remains throughout the trial."

In the Scott case, *supra*, the Supreme Court of California says: "It is by no means safe to infer that because a party has the burden of meeting a *prima facie* case, therefore he must have a preponderance of evidence. It may be sufficient for him to produce just enough evidence to counterbalance the evidence adduced against him." And further says, in speaking of the burden of proof being shifted to the defendant and back again to the plaintiff: "The two burdens are distinct things. One may shift back and forth with the ebb and flow of the testimony. The other remains with the party upon whom it is cast by the pleadings—that is to say, with the party who has the affirmative of the issue."

We are inclined to the view that the instruction would

be a better statement of the law, in this respect, if the words "a preponderance of" were omitted.

The sixth instruction for the plaintiff has the same element last referred to in the fourth, and besides requires the defendants to prove "that the accident resulted from a cause which could not have been foreseen or guarded against by the highest degree of human care, skill and forethought practicable."

As we have seen, the rule is that the carrier must exercise the highest degree of human care, vigilance and foresight which is *reasonable* under the circumstances and in view of the character of the mode of conveyance adopted, *reasonably* to guard against accidents, etc. R. R. Co. v. Byrum, 153 Ill. 135.

To the same effect are R. R. Co. v. Blumenthal, 160 Ill. 48; R. R. Co. v. Pillsbury, 123 Ill. 9-21; R. R. Co. v. Kerr, 148 Ill. 605, and cases cited; Penn. Co. v. McCaffrey, 173 Ill. 173. In the Kerr case a similar instruction, which omitted the modification of the phrase "practical operation of its road" by the word *reasonable*, was condemned, and the court say: "A railroad company, doing all that human care, vigilance and foresight can do, consistently with the practical operation of its road, in providing a safe road-bed, track, etc., could be required to make it of solid masonry, with ties of iron or stone, but ordinarily it would be unreasonable to require it to do so."

We think this instruction should have been modified, at least by the insertion of the word *reasonably* before the word *practicable*.

The plaintiff's eighth instruction in the first part states the rule as to the care to be exercised by the carrier properly, but in the latter part of the instruction the court tells the jury that the carrier undertakes to exercise "the highest degree of care to secure the safety of passengers, and as such is responsible for the slightest negligence resulting in injury to the passenger." This we think was contradictory, and calculated to mislead the jury. The highest degree of care, without any qualification, may be very different from the highest degree of care which is

reasonable under the circumstances and in view of the character of the conveyance.

We see no objection to the plaintiff's ninth instruction in so far as it relates to the defendants, other than the Elevator Company, as to which it was improper because the evidence did not justify the instruction.

The plaintiff's tenth instruction was proper. The evidence to which the instruction refers would clearly have been improper if not limited to the specific purpose for which it was offered.

Numerous instructions asked for defendants were refused, and some modified, and given as modified, by the court, all of which we have considered, and find no reversible error in any of the rulings of the court as to such instructions. It seems to us unnecessary to discuss them in detail.

Numerous objections as to the admission and exclusion of evidence are made, all of which we have considered, and while we are inclined to think that in none of the court's rulings on the evidence is there reversible error, it is not important now to pass on the questions discussed, for if there was error it may be avoided in another trial.

It is also claimed that the judgment is excessive, and that it was the result of the misconduct of counsel for plaintiff during the trial and in the argument to the jury. The conduct of plaintiff's counsel in insinuating that one of defendants' witnesses was a spy and an informer was highly improper and should have been rebuked by the court. Also the statements of counsel in argument, not supported by the evidence, were grossly improper, calculated to prejudice the jury, and should have been promptly reprimanded by the court.

It is, however, unnecessary in this case for us to consider whether the misconduct of counsel was, under all the evidence, sufficient to justify a reversal of the judgment for that reason. Such a question should not arise on another trial.

For the errors in sustaining the demurrer to the plea of the statute of limitations, in not directing a verdict of not guilty as to the Crane Elevator Company, and in the giving

of certain instructions for plaintiff above referred to, the judgment is reversed and the cause is remanded.

MR. JUSTICE SEARS, dissenting.

I do not concur in the conclusion reached by a majority of the court as to the application of the statute of limitations.

The second of the original counts alleged, in substance if inartificially, that all the defendants jointly operated the elevator as a common carrier; that plaintiff was a passenger and was injured by reason of a defect and fault in the machinery of the elevator. The allegations of the additional counts which charge all defendants with a liability as common carrier to appellee, a passenger, are but re-statements of those substantial allegations of the original declaration. It does not matter what else was contained in the original counts or how much there may have been which was ineffective or badly pleaded, if with it all the substance of the new allegation was contained. Because the evidence failed to sustain these charges of the original declaration, is not reason for holding that the plea of the statute was good.

Calumet Gas Co. v. Stephen Creutz.

1. EVIDENCE—*Where Comparisons Are Not Competent.*—In actions for damages occasioned by leaving a ditch unprotected at night, it is not competent to show that the parties in charge of the ditch took the same precautions in placing signals to warn persons of its presence which other men in the same business ordinarily took.

Action in Tort, for injuries to a horse. Trial in the Circuit Court of Cook County, on appeal from a justice of the peace; the Hon. GEORGE W. BROWN, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court, at the March term, 1898. Affirmed. Opinion filed January 24, 1899.

STATEMENT.

This is an action in tort for injuries to a horse; it was begun in a justice's court, carried to the Circuit Court, where

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plaintiff recovered a judgment for \$75. It now comes before this court on appeal.

The facts in the case are as follows: October 14, 1895, the Calumet Gas Company dug a ditch on Coles avenue, beginning at a point ten or twelve feet south of Cheltenham place and extending north about 200 feet. There was at that time a permanent city drain ditch on the west side of the roadway on Coles avenue. The Gas Company built their ditch on the east side of the city ditch. It had been dug during the daytime in the absence of appellee, who had no knowledge of its having been dug. The ditches were close together, so close, in fact, that the tops of the two were together. About ninety feet from Cheltenham place there was a private way ten feet wide which led to the plaintiff's barn. This way is referred to as an alley. The city drain ditch was covered in front of the alley by a culvert ten feet wide. Before leaving the ditch, October 14th, the defendant's servants filled in a space eighteen feet wide in front of the alley and packed the dirt down hard. This made a filling extending four feet beyond each end of the culvert. Both ditches were dug along the roadside. The defendant's servants placed lighted red lanterns on sticks at each end of the ditch as at first dug, the one at the south end being something less than eighty feet from the end of the alley. The light was at all times in full view. They placed no lights at the alley. October 14th, at about 7 p. m., the plaintiff started to ride to South Chicago on horseback, and his horse fell into the ditch and was injured, for which injury the plaintiff seeks to recover.

The light at the south end (the direction in which plaintiff started to go and the part of the ditch his horse fell into) could be seen by any one coming out of the alley.

GREEN, HONORE & PETERS, attorneys for appellant.

JOHN E. ANDERSON, attorney for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

The first point made by appellant is that the verdict is

contrary to the evidence. The testimony is conflicting upon material points. No objection is presented as to instructions given or refused. A city ordinance provides that any person using any portion of the street, etc., shall cause a red light to be placed "at either end" of any obstruction. Appellant dug a ditch in Coles avenue from near Cheltenham place to a point about 200 feet north of the starting point. It then filled this ditch a distance of eighteen feet in front of the alley from which appellee came onto Coles avenue. There were then two ditches in Coles avenue dug by appellant, one running from the alley south and the other from the alley north. There was a red light at the south end of the original ditch and one at the north end. No such lights were placed at the ends of the two ditches at or near the alley.

The case was fully and fairly presented to the jury and their finding upon the questions of fact we are not inclined to disturb.

It is contended by appellant that the court erred in excluding testimony offered by it to show that it took "the same precautions which men in the same business ordinarily took." The alleged error occurred during the examination as a witness, of the city inspector on duty in Coles avenue at that time. The record is as follows:

"Q. And you considered that everything had been done right? A. I did, sir.

"Q. Did you take precautions that you usually take? A. Always; yes, sir.

"Q. Did they take the same precautions which men in the same business ordinarily took?"

To this last question the court sustained an objection, to which ruling appellant excepted. It does not seem to us that there was any error in this ruling. Whether it is ever permissible to make the comparison here sought to be made is, to say the least, doubtful. The only authorities cited to sustain that contention are Massachusetts cases. But those cases do not hold that the question in the case at bar, in the form the same is presented, is proper. At least one of those cases holds that different degrees of care in different locali-

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ties depend upon a great variety of circumstances. And the question must be limited to the same vicinity and to property similarly situated or under similar circumstances. The answer to the question in this record might have been based upon what men did in London, or some other foreign city, and under circumstances entirely different, and as to property differently situated, and where there were different laws or ordinances. The trial court did not err in sustaining said objection. *C. & E. I. R. R. Co. v. Driscoll*, 176 Ill. 330, 335.

Perceiving no reversible error, the judgment of the Circuit Court is affirmed.

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88	173

John Colson v. C. F. Craver, A. Steele and M. Austin.

1. **HAZARDS**—*What Risks the Employe Assumes.*—The employe only assumes the risks ordinarily incident to his employer's business and to the manner of having it performed.

2. **MASTER AND SERVANT**—*Injuries to Servants While Obeying Orders.*—Where the servant is injured while obeying the orders of his master to perform work in a dangerous manner, the master is liable, unless the danger is so imminent that a man of ordinary prudence would not incur it.

3. **SAME**—*Evidence of the Employer's Mode of Doing Business.*—Proof of matters with reference to the employer's usual and known manner of performing the business in which the servant is engaged, occurring within a reasonable time before the accident, is competent.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Verdict and judgment for defendant by direction of the court. Error by plaintiff. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed January 26, 1899.

JOHN C. TRAINOR, attorney for plaintiff in error.

ARCHIBALD CATTELL, D. F. MATCHETT and DEFREES, BRACE & RITTER, attorneys for defendants in error.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

The only question argued in this case by plaintiff in error is whether the court should have submitted the evidence to the jury, and we will therefore only consider it.

The contention of appellee Craver, that the bill of exceptions is not properly in the record and can not be considered, was disposed of on motion to strike the bill of exceptions from the files, which was denied April 4, 1898. The plaintiff's second amended declaration, on which the trial was had, the defendants interposing the general issue, consisted of three counts which, in substance, allege that plaintiff was an employe of defendants, who operated certain unsafe and dangerous machinery by steam, in their buggy and wagon factory, at Harvey, Illinois, to wit, a circular saw operated by steam, which was suitable only for cutting or ripping long pieces of lumber, and was not safe for cutting or ripping short pieces of lumber without the aid of a helper; that defendants well know that the operation of said saw in cutting or ripping short pieces of lumber by one man, without the aid of a helper, was extremely dangerous, but this fact was unknown to plaintiff; that defendants negligently required plaintiff to cut and rip short pieces of lumber on said saw, operated as aforesaid, without the aid of a helper, and plaintiff, in endeavoring to execute defendants' orders, while exercising due care on his part, and by reason of defendants' negligence, had his left hand cut off by said saw, etc.

At the close of the plaintiff's evidence, defendants moved the court to instruct the jury to find the defendants not guilty, which was overruled. The motion was renewed at the close of all the evidence, and a written instruction to that effect was given by the court, which is the error complained of.

The evidence shows that plaintiff was forty-seven years of age, a laborer, not a mechanic, but had had about three years' experience in the operation of such saws as defendants'; that he was employed by defendants as a laborer from April

27th to May 22, 1891, in bringing lumber from their lumber yard into the mill or factory of defendants; that on the latter day, at plaintiff's request, he was put to work cutting or ripping lumber upon the saw by which he was injured on May 23, 1891, and during that day he was assisted by a helper in cutting with the saw what the witnesses termed "short stuff," or short lumber.

The saw in question, which was operated by steam power, and the manner of its operation, is thus described by counsel for defendants in error (which we think fairly states the evidence), viz.: it was a "table saw," consisting of a table fifteen feet long through which there was a slit in which revolved a circular saw some eighteen inches in diameter. The saw itself was revolved upon a stationary axle, but the table moved upon little wheels or rollers, being pushed forward or pulled toward the operator as he desired. A strip or strap attached to the table furnished a handle to move it. The saw teeth were an inch and a quarter long. The sticks of lumber to be sawed were placed upon this table. Two pieces of iron or guards kept the lumber in position, and at the back of the table there was a cleat to keep the sticks in line. A pressure lever kept them from going farther than the guard on the side; and fenders on the side upon which the sawing was being done protected the sawyer. By either pushing the table toward the saw or pulling it toward himself, as the case might be, the sawyer brought the lumber into contact with the saw.

The plaintiff testified with reference to the circumstances attending his injury as follows:

"This foreman told me in the morning to go to work. 'What are you waiting for?' He came up to me, and I says, 'I am waiting for my helper;' he says, 'There is only a few pieces left there, you can do that yourself all right.' So I thought he knew something about it, and I went to work on it. I went to work ripping short stuff, twenty-four inches long, to the best of my knowledge. He set me to work on the saw that I got my hand cut off; what is called the table saw in common language; sometimes it is called a circular saw, but we called it always the table saw. This saw had a table, I should judge, from fifteen to eighteen

feet long. The stuff I was ripping was four inches thick—ash wood. I should judge it was hard wood, because it was pretty dry. I was ripping there four-inch ash, twenty-four inches long, and I ripped a piece there an inch and a half out of that, that is, I was cutting off this, a chunk an inch and a half. This chunk was a piece of timber twenty-four inches long and four inches thick, and I was ripping a piece off of that one inch and a half wide. I would pull the whole thing over like that (illustrating). The saw was right about there, and the piece was about three inches wide, I should think. This was about three inches (illustrating). Three inches wide here (indicating). I put my hand over that to hold it steady, and I pulled it over and the piece raised up; I couldn't hold it and it jammed right in; and it took my hand off here. I couldn't say how long I was working on the saw before my hand was taken off that morning, only a few minutes. My hand was taken off when the first piece was taken off; the first piece I was working on in the morning. At the time the foreman set me to work on this saw, ripping this short stuff, he did not apprise me or say anything to me about the danger of working that kind of stuff on that saw. Mr. Carlson, the helper, had been working with me on this short stuff the day before. He worked with me there before. I told the foreman I was waiting for my helper. I wanted my helper because it was hard work to work all alone at it. At the time I was injured no one was assisting or helping me on this saw that I was ripping this stuff with. Mr. Carlson helped me to rip the last piece I ripped on this saw the night before I was injured. I worked on this stuff the day before, I should judge, as late as from three up to six o'clock."

The plaintiff was corroborated by two witnesses as to the manner and circumstances of the injury.

The only evidence offered by the defendants was of one witness, tending to show previous experience of plaintiff with saws, and, on cross-examination, that plaintiff was given the work at the saw at his own request; that it was used for ripping long and short pieces of lumber, and had been operated by witness in ripping short stuff without a helper.

We are of opinion that this evidence presents matters for the consideration of the jury, and that the learned trial judge should not have instructed a verdict of not guilty at the close of all the evidence.

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The employé only assumes the risks ordinarily incidental to his employer's business and to the employer's known manner of having it performed. 3 Elliott on Railroads, Secs. 1289 and 1296, and cases cited; Ill. Steel Co. v. Schymanowski, 162 Ill. 447.

That this saw was dangerous to the operator, is apparent from the evidence. It was ordinarily operated by defendants in the cutting and ripping of short lumber, as the evidence tends to show, by two men, the sawyer and a helper. Plaintiff was *ordered* by defendants' foreman to go to work to cut some short pieces of lumber without a helper, and while plaintiff was sawing the first piece his hand was taken off. He told the foreman he was waiting for his helper, but on receiving the order he went to work. He testifies, "So I thought he knew something about it, and I went to work on it. * * * He did not apprise me or say anything to me about the danger of working that kind of stuff on that saw."

It can not, as matter of law, be said, from this evidence, that the danger was so imminent that an ordinarily prudent man, knowing it, would not have encountered it. On this matter reasonable and fair-minded men might honestly differ, and the question should have been left to the jury. *Dallemand v. Saalfeldt*, 175 Ill. 310; *Union Show Case Co. v. Blindauer*, Id. 325; *Offutt v. World's Columbian Exposition*, Id. 472.

In the latter case the court say (p. 478):

"The next contention is, that it appears from the testimony given by plaintiff himself, that he knew that it was unsafe to place the double loop through the hook and to use the short stage or scaffold sent up to him, as he was ordered to do by the foreman, and that, having knowledge of the danger likely to result from his compliance with the foreman's demands, he should, acting prudently, have refused to obey, and that failing in this he was guilty of such contributory negligence as precludes recovery on his part. Under the evidence it can not be assumed, as a matter of law, that the danger was so imminent that no man of ordinary prudence, having knowledge of it, would incur it. The rule is, that where the servant is injured while

obeying the orders of his master to perform work in a dangerous manner, the master is liable, unless the danger is so imminent that a man of ordinary prudence would not incur it. Under the evidence in this record it would seem clear that it was a question of fact for the jury to determine whether the danger was of the character mentioned, and whether the plaintiff knowingly incurred it. The mere fact that he did not regard it as safe to fasten the hook over the double loop, and that the usual, customary and safer way was to attach the hook to the single loop, with a noose over the beam or rafter, and that he regarded the stage or scaffold as too short, but performed the work as specifically directed by the master, was not, under all of the circumstances of this case, such proof as to authorize the court to say to the jury, as a legal proposition, that the evidence, with all justifiable inferences to be drawn from it, was insufficient to authorize recovery."

Inasmuch as there may be another trial of this case, we call attention to the exclusion by the court of evidence as to the usual and ordinary method of conducting defendants' business. As we have seen, the employe only assumes the risks ordinarily incidental to his employer's business and to the employer's known manner of having it performed. The court, by several rulings, refused to allow plaintiff to prove anything that occurred with reference to the operation of the saw the day before the accident. It is true there was some evidence in this regard admitted, but some was excluded which was competent on the question as to whether plaintiff assumed the risk of injury. If defendants usually and ordinarily had a helper to assist the sawyer in the operation of this saw, that fact was of great importance to plaintiff, as may be seen from an examination of very many of the adjudicated cases on assumed risks.

The judgment will be reversed and the cause remanded.

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Arthur O. Slaughter and William V. Baker v. Charles Norman Fay.

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1. FRAUD—*Where One of Two Innocent Persons Must Suffer.*—Where one of two innocent parties must suffer a loss by reason of the dishonesty of a third person, the loss must fall upon the one who has been the most instrumental in placing such third person in a position enabling him to successfully practice the dishonesty.

2. COMMERCIAL PAPER—*Forged Indorsements.*—Where the name of a payee in a check is forged as indorser, the money called for by the check can not be legally obtained thereon from the drawee, and the payee can not be injured by such forgery.

3. CHECKS—*Operate as Assignments of Funds, etc.*—A bank check, in the form of those under consideration in this suit, operates as an assignment to the payee of so much of the drawer's money then in the drawee's hands as is named in the checks. And such money can be procured only by the direct and affirmative act of the payee named in the check.

4. SAME—*Assignment by Agents.*—So far as the drawer of a check is concerned, it is immaterial whether the act of assigning it is by the payee personally or by another duly authorized to perform such act.

5. PRINCIPAL AND AGENT—*Powers of Attorney to be Strictly Construed.*—A power authorizing an attorney to indorse checks for deposit in a certain trust company does not authorize such attorney to indorse checks for deposit in any other place or to any other party.

6. SAME—*Principal—When Bound for the Wrongful Act of Agent.*—The principal is liable for the wrongful or fraudulent act of the agent if committed within the scope of his authority.

7. REMEDIES—*Actions for Money Had and Received.*—The action for money had and received may be maintained whenever the defendant has obtained money of the plaintiff which in equity and good conscience he has no right to retain.

8. BANKS AND BANKING—*Duty in Drawing Checks.*—Where a banker draws a check payable to the order of a party and delivers it to his agent, no duty rests upon the banker to follow the check and see that it is properly indorsed before it is negotiated.

9. ESTOPPEL—*To Deny an Agent's Act.*—Where a person authorizes his agent to indorse a check, which he does, and the act is within the scope of his authority, such party is not permitted to say that he is not liable for the acts of his agent because the authority was intended only to apply to checks received by the agent in the proper management of his business, and that his agent willfully perverted the power vested in him to do something more than was designed or intended.

Assumpsit, to recover money deposited in defendant's bank. Trial in the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge,

presiding. Verdict and judgment for defendant by direction of the court. Appeal by plaintiffs. Heard in the Branch Appellate Court at the March term, 1898. Reversed and remanded. Opinion filed January 24, 1899.

STATEMENT.

In June, 1894, appellee was the owner of a so-called installment receipt issued by the Chicago Edison Company, which, on payment of the installments, and on surrender of the receipt, entitled him to 200 shares of the capital stock of the Edison Company. On the 23d day of June, 1894, being about to go East for the summer, appellee executed a power of attorney, of which the following is a copy, to one Charles E. Anderson, who was, then and there, and for some time had been his private and confidential clerk :

“Know all men by these presents, that I do hereby make, constitute and appoint Chas. E. Anderson to be my true and lawful attorney, for me and in my name, to draw checks, bills of exchange and drafts, and make orders and overdrafts upon the Northern Trust Company of Chicago; and in my name to indorse checks, drafts, bills of exchange, notes and orders for deposit in said Northern Trust Company, hereby confirming all that my said attorney shall do under above authority.”

Appellee at this time was interested in several corporations. Anderson collected appellee's rents and paid his bills, and was the only person having anything to do with his business, except appellee himself. When appellee left for his summer vacation he intrusted to Anderson the custody of the installment receipt referred to. He left with his brother-in-law, Wilmerding, who was the general superintendent of the Edison Company, a power of attorney to surrender the installment receipt on its full payment and to receive the stock. Anderson, under instructions from appellee, drew checks on appellee's bank for the different installments which became due after appellee's departure, and on the 7th of August, 1894, all the installments having been paid, Wilmerding executed a document surrendering the installment receipt. Two certificates of stock numbered 1334 and 1335 for 100 shares each, were, by Wilmerding's

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direction, delivered by the Edison Company to Anderson. Anderson was implicitly trusted by appellee. He was left in charge of appellee's office at Chicago, and of his business during the whole of that summer and until appellee's return in October. Appellee had, prior to this time, bought and sold stocks and bonds upon the Chicago Stock Exchange through appellants, who were bankers and brokers at Chicago, and had become acquainted with Anderson as appellee's private secretary or business agent. Anderson had brought to appellant's office some stocks, the sale of which appellee had arranged for. Anderson had also received from appellants, various stocks purchased by them for appellee.

Appellee, as stated, left Chicago about the 23d day of June, 1894, after executing the power of attorney above referred to. He did not return to Chicago until the 8th or 9th of October. In the meantime he trusted his whole business and affairs to Anderson.

September 12, 1894, Anderson had a telephone conversation with Mr. Baker, one of the appellants, informing him that appellee wanted to sell some Edison stock, and asked what price appellants could get for it on the Chicago Stock Exchange. Baker inquired and reported that it was offered at \$125 per share. Anderson said he didn't think appellee would sell at that price, but he would wire him at his summer residence in the East and would let Baker know the result. The next day (September 13th) Anderson telephoned Baker that he might sell fifty or 100 shares at the market price; and appellants then sold fifty shares at the then market price (\$123 per share), and gave Anderson a check, payable to the order of appellee, for \$6,137.50, which was the amount of the sale, less their usual commissions. This check was by Anderson indorsed in appellee's name and deposited in the Northern Trust Company and credited to appellee's account in that bank. On the day of the first conversation with Baker, Anderson sent over to appellants' office certificate numbered 1335 for 100 shares, bearing upon its back an assignment purporting to have been made by

appellee, but which in fact was a forgery. This certificate was sent to the Edison Company's office by appellants and split up into two new certificates, each for fifty shares, which were delivered to appellants by the Edison Company, one of which was transferred to the party to whom the fifty shares had been sold, and the other was retained by appellants. September 14th Anderson again telephoned appellants, inquiring whether the remaining fifty shares had been sold, to which Baker replied no; that he could not get the same price that the first fifty shares had been sold for. Anderson then said that appellee needed money and arranged for a loan of \$6,000 upon it. Upon this loan appellants gave a check for \$6,000, payable to appellee's order. This check also was indorsed by Anderson in appellee's name and deposited to appellee's credit with the Northern Trust Company. September 25th Anderson telephoned appellants that appellee was in need of more funds, and did not want to sell the stock at the previous price, and asked if appellants would make another loan, for which he would send over another certificate for 100 shares. Baker asked how much was wanted. Anderson replied \$8,000. Baker said that was all right, and so Anderson sent over the other certificate (No. 1334) for 100 shares, and on the same day (September 25th) appellants gave him a check for \$8,000, which check was also made payable to appellee's order and was by Anderson indorsed in appellee's name and deposited to his credit with the Northern Trust Company.

October 4th an additional advance of \$2,000 was made upon the 150 shares then in appellants' hands. This was also arranged by telephone and a check for \$2,000 to appellee's order was given, and was also deposited to appellee's credit with the Northern Trust Company. In arranging for this loan Anderson told Baker that this \$2,000 was all appellee wanted, and that would be final.

October 8th, by Anderson's direction, appellants sold twenty-five shares at \$120, and credited appellee's account with the proceeds, \$2,987.50.

The foregoing comprise all the transactions between Anderson and appellants.

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The second certificate was also sent by appellants to the Edison Company and split up, and the new certificates were delivered to appellants by the Edison Company. One of them, being for twenty-five shares, was transferred to the purchaser, and the remaining 125 shares were held by appellants as security for their loans.

Appellants did not know of the power of attorney which had been executed by appellee to Anderson. They had no reason to suppose that the money could be drawn out of appellee's bank, except by appellee's own check. Appellee returned to Chicago about October 9th, and found at his office a statement from appellants of the sale of the twenty-five shares, whereupon he called at appellants' office for an explanation. Baker then furnished him a full statement of appellants' transactions with Anderson, and appellee thereupon stated to Baker that his signature had been forged. Appellee at once went to the Northern Trust Company, revoked Anderson's power of attorney, and had his account written up. He checked upon the bank statement, in red ink, such of Anderson's deposits and checks as he claimed had been legitimately made for him by Anderson. As to the balance of the deposits, he testified that he knew nothing about them, and that the balance of the checks were not drawn for any of his purposes, and there were no business transactions of his to which these items could have been applicable. He had Anderson arrested and sentenced for larceny. After being transferred to the hospital on the plea of sickness Anderson escaped, and has ever since remained a fugitive. He was never indicted for forgery.

October 19, 1894, appellee filed a bill in the Superior Court of Cook County against the Chicago Edison Company, seeking reinstatement as the holder of the 200 shares of stock which had been transferred by the Edison Company upon the forged indorsements, and for the issuance to him of new shares evidencing such ownership. In that suit appellee obtained a decree for the issuance of such new stock, and in accordance therewith new certificates were issued to him, and the dividends which had in the mean-

time accrued on the old stock were paid to him. (62 Ill. App. 55, and 164 Ill. 323.) After that decree appellants delivered to the Edison Company 200 shares in place of the certificates in question, and also paid the company the accrued dividends upon such shares, with the interest thereon. This action was brought by appellants against appellee to recover the different sums which had been deposited in appellee's bank by Anderson upon the transactions in question.

The undisputed evidence showed that during August Anderson had checked and drawn out of appellee's bank account, for purposes which appellee called illegitimate, \$2,950, and had deposited \$1,000 obtained from some source as to which appellee also was in ignorance.

By the end of September Anderson had replaced out of the money received from appellants \$2,775. The net amount of his embezzlements from the first to the sixth of October was \$950. With the money received from appellants and deposited to appellee's credit, and with appellee's own money, he had a balance to his credit on every day from September 13th up to the end of that month, and was not overdrawn until October 4th, which was after Anderson embezzled the \$950. This overdraft was also made good by the deposit of appellants' last check for \$2,000 October 5th.

The court directed the jury to find a verdict for appellee and refused to give to the jury the instructions which were asked by appellants, or to pass upon such instructions or either of them, or to mark the instructions or either of them "refused," to all of which rulings the appellants excepted.

The jury in obedience to this direction found a verdict in favor of appellee. Appellants moved for a new trial, which motion was overruled and an exception noted and judgment was entered upon the verdict, from which judgment this appeal is prosecuted.

ULLMANN & HACKER and WILLIAM H. SWIFT, attorneys for appellants, contended that where one of two innocent

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parties must suffer a loss by the fraud or wrong of a third party, the one who put it into the power of such third party to commit such fraud or wrong must bear the loss. *Mechanics on Agency*, Sec. 739; *Yeck v. Crum*, 122 Ill. 268; *Hern v. Nichols*, 1 Salk. 289; *Griswold v. Haven*, 25 N. Y. 595; *Mechanics Bank v. N. Y. & N. H. Ry. Co.*, 13 N. Y. 599.

“The scope of an agent’s authority can not properly be restricted to what the parties intended in the creation of the agency, for that would also exclude negligence, as no agent is appointed for the purpose of being negligent, any more than for the purpose of acting fraudulently. The question can not be determined by the authority intended to be conferred by the principal. We must distinguish between the authority to commit a fraudulent act and the authority to transact the business in the course of which the fraudulent act was committed.” *Reynolds v. Witte*, 18 So. Car. 5; *T., W. & W. R. R. Co. v. Harmon*, 47 Ill. 298; *Mulvehill v. Bates*, 31 Minn. 364; *Southern Express Co. v. Jasper Trust Co.*, 99 Ala. 416.

The rule is familiar, that a person who knowingly allows another person’s property to be mixed with his own, so that the property of such other person can not be distinguished, must bear the whole loss. *Beach v. Schmultz*, 20 Ill. 185; *Fuller v. Paige*, 26 Ill. 358; *Diversey v. Johnson*, 93 Ill. 547; *First Natl. Bk. v. Schween*, 127 Ill. 573.

“The action for money had and received is supported without any privity between the parties other than that which is created by law. Whenever one man has in his hands the money of another which he ought to pay over, he is liable to this action, although he has never seen or heard of the party who has the right. When the fact is proved that he has the money, if he can not show that he has legal or equitable ground for retaining it, the law creates the privity and the promise.” *Hall v. Marston*, 17 Mass. 575; *Pierce v. Crafts*, 12 Johns. 90; *Taylor v. Taylor et al.*, 20 Ill. 650; *Chitty on Pleading*, Vol. 1, 353.

Anderson’s authority under the power was strictly analogous to that of a partner. He had a right to draw for appellee’s use, and he had a right to draw for his own use to the extent of the appellee’s indebtedness to him. Each

partner is the agent of the firm, and the firm is liable for his torts committed within the scope of his agency. Bates on Partnership, Vol. 1, Sec. 461; Tenney v. Foote, 95 Ill. 99; Wiley v. Stewart, 122 Ill. 545.

If one of the partners converts to his own use property in the possession of the firm, all the partners are liable. Even if the partner who converts the property improperly procured it and placed it in the custody of the firm in order that he may have the opportunity of converting it to his own use, the firm is liable. This was decided in several cases arising out of the notorious Fauntleroy forgeries, which occurred in London in the year 1819. Marsh v. Keating, 2 Clark & Fin. 250.

WILLIAMS, HOLT & WHEELER, attorneys for appellee, contended that the mere unauthorized deposit of money in Fay's bank account, from which it was withdrawn before he knew it was there, did not make it his money or render him liable to the depositor. Bank of Las Vegas v. Oberne, 121 Ill. 25; Andrews v. Ætna Life Ins. Co., 92 N. Y. 596, 604; Story on Agency, Sec. 248; 1 A. & E. Encyc. (2d Ed.), 1193.

This is not a case between "two innocent parties." It was Slaughter, and not Fay, who put it into the power of Anderson to steal the money. Bank of Las Vegas v. Oberne, 121 Ill. 25; Penna. Co. v. Franklin Ins. Co., 181 Pa. 40; Hurley v. Watson, 68 Mich. 531.

Anderson's dealings with the stock were not within the scope of his actual or apparent authority. Bank of Las Vegas v. Oberne, *supra*, 121 Ill. 25; Rawson v. Curtiss, 19 Ill. 456, 474-5; Mechem on Agency, Secs. 276, 288, and cases cited; Baxter v. Lamont, 60 Ill. 237; Peabody v. Hoard, 46 Ill. 242; Wharton on Agency, Sec. 139; Davidson v. Porter, 57 Ill. 300, 305; Law v. Stokes, 3 Vroom, 249; 1 A. & E. Encyc. (2d Ed.), 989, and cases cited; Edwards v. Dooley, 120 N. Y. 540; Griswold v. Haven, 25 Id. 595.

No part of the unauthorized deposits was used for Fay's benefit, or remained subject to his control when he learned of the frauds.

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(1) The money was actually all gone.

(2) Anderson's supposed prior embezzlement from Fay does not make Fay liable to Slaughter for the amount of such prior defalcation. *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268; *Baldwin v. Burrows*, 47 N. Y. 199; *Hastings v. Bangor House Prop.*, 18 Me. 436; *In re Ketchum*, 1 F. R. 815, 830, 832, 833; *Bohart v. Oberne*, 36 Kas. 284; *Spooner v. Thompson*, 48 Vt. 259; *Thatcher v. Pray*, 113 Mass. 291; *Pope v. Lowitz*, 14 Ill. App. 96.

(3) No part of the Slaughter money is shown to have been actually paid out for Fay's benefit. *Moses v. McFarlan*, 2 Burr. 1012; *Supervisors v. Manny*, 56 Ill. 160.

MR. JUSTICE HORTON delivered the opinion of the court.

In this case there is but very little, if any, conflict in the testimony as to any material fact. The two stock certificates delivered by Anderson to appellants were in the name of appellee. There is no question but that the indorsement thereon of the name of the appellee was a forgery. Appellants did not pay Anderson in currency or in checks to his order, but gave him in payment for said certificates their checks *payable to the order of appellee*. There were four such checks, given at different times, amounting to the sum of \$22,137.50.

During all the period covering the transactions in question, appellee was absent from Chicago and Anderson attended to all his business there. By the power of attorney which appellee gave to Anderson, the latter was authorized to indorse checks in the name of appellee "*for deposit in said Northern Trust Company*," being the bank where appellee made his deposits. Anderson was not authorized to indorse checks payable to the order of appellee for any purpose except to deposit the same in said bank. He could not have used either one of appellants' checks in any way except to deposit it in that bank to the credit of appellee. Each and every one of the four checks in question was payable to the order of appellee by the name C. N. Fay, and

had thereon the indorsement, "For deposit, C. N. Fay." All of said checks, thus indorsed, were deposited in said bank, and the amount thereof passed to the credit of appellee.

Had the name of appellee been forged as indorser upon those checks, the money of appellants could not have been legally obtained thereon, and they would not have been injured thereby. But the indorsement was not a forgery. It was put there by one authorized by appellee to do it, and hence was, in law, the act of appellee himself, as fully as though he had personally performed the physical act of writing his name upon the back of the checks.

At the time said checks were given, appellants were not aware of the fact that Anderson held said power of attorney. There were no dealings between appellants and appellee after said power of attorney was given to Anderson, except the transactions in question. Appellants, therefore, had no reason to suppose that Anderson was in a position such that he could embezzle the money represented by said checks, or that such money could be obtained by any one or in any manner except by appellee personally. Anderson was put in that position by appellee. It was only by reason of the confidence reposed in him, and the authority vested in him by appellee, that Anderson was enabled to steal appellee's money, or any part thereof. Appellants in no manner authorized Anderson to obtain the money upon said checks. They did nothing, neither did they omit to do anything which they should have done, in consequence of which Anderson was enabled to obtain the money upon said checks. But for the acts of appellee Anderson could not have secured that money. We are therefore unable to discover any reason, either in law or equity, why appellants should be held to be responsible for the acts of Anderson in causing such money to be placed in bank to the credit of appellee.

We need not here discuss, at length, the legal construction or effect of bank checks in the form of those under consideration. They operate as an assignment to the payee

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of so much of the drawer's money then in the hands of the bank named in the checks. That money can then be procured only by the direct and affirmative act of the payee named in the checks. In so far as the drawer of the checks is concerned, it is immaterial whether such act is performed by the payee personally, or by another who is by the payee duly authorized to perform such act. It is immaterial whether appellee indorsed said checks with his own hand or with Anderson's hand. It was, in law, his act. *Taylor v. Taylor*, 20 Ill. 650, 652.

If the indorsements of the name of appellee upon the checks of appellants were not legal and valid indorsements, then the Northern Trust Company would be liable, either to appellants or to the bank upon which the checks were drawn, for the amount of money it obtained upon such checks. In that event the appellee would be liable to pay to the Trust Company the amount it was thus compelled to pay. It will not, however, be contended but that as between the appellee and the Trust Company, where the checks were deposited, the indorsements were, in law, as valid and binding upon appellee as though made with his own hand. If such indorsements be valid and binding as between appellee and his bank, why are they not equally binding as between appellee and appellants? If they be sufficient to effect a transfer of the money from the bank of appellants to the credit of appellee in his bank, why are they not sufficient to protect appellants as against the claim of appellee? Appellee ought not to be permitted to repudiate the sale of the stock by Anderson to appellants, and at the same time to retain the proceeds of such sale. When the money of appellants was, by the act of appellee, taken from their bank and placed to his credit in his bank, it became his money. Upon the question of legal responsibility, it is a matter of little or no consequence to appellants how, or for what purpose, appellee personally, or by his duly authorized attorney in fact, checked the money out of his bank.

But it is contended on behalf of appellee that no part of the money obtained on these checks and deposited to his

credit in his bank remained there when he learned of Anderson's fraudulent conduct—that Anderson had checked it out for his own use—and therefore appellee is not liable therefor. This contention can not be sustained. To support this position, it is urged that Anderson was authorized to draw checks in appellee's name for appellee's use and benefit only, and was not authorized to draw such checks for his own use or benefit. That may be correct as between appellee and Anderson. It is not, however, binding as between appellee and appellants, who had no notice of this private understanding.

As to the indorsing of checks and other bills receivable, which are made payable to the order of appellee, the power of attorney authorizes Anderson in these words: "In my name to indorse checks, drafts, bills of exchange, notes and orders for deposit in said Northern Trust Company." It thus appears that as to indorsing checks, etc., the power and authority of Anderson is restricted to indorsements for deposit in said Trust Company. He was not empowered to indorse the checks in question for deposit in any other bank or for transfer to any other party. But there is in the power of attorney no restriction or limitation whatever as to the power or authority of Anderson to draw checks, or as to the use he shall make of them, or the purpose for which they shall be drawn, except that they shall be drawn upon said Northern Trust Co. That provision of said power of attorney is as follows: "I do hereby make, constitute and appoint Chas. E. Anderson to be my true and lawful attorney, for me, and in my name, to draw checks, bills of exchange and drafts, and make orders and overdrafts upon the Northern Trust Company of Chicago."

If the contention be correct that as between appellee and Anderson the latter had no authority to draw checks except for appellee's personal use or business, and if it be true that this limitation of his authority extends to and is binding upon third parties, then the Northern Trust Company Bank honored checks drawn by Anderson in the name of appellee, and charged the same to appellee's account, which it should

not have done. If that secret limitation of Anderson's power is to be enforced, as against appellants, it must be binding upon the bank also. If that be so, then in the eye of the law the money collected on appellants' checks and placed to the credit of appellee in his bank is still there to his credit, and he should not be permitted to keep the money after having recovered his stock.

This suit is for money had and received. We think the form of action is well chosen. In *Taylor v. Taylor* (*ante*), 20 Ill. 650, 653, it is held to be "the well recognized doctrine that the action for money had and received may be maintained whenever the defendant has obtained money of the plaintiff which in equity and conscience he has no right to retain." *Hall v. Marston*, 17 Mass. 575; *Pierce v. Crafts*, 12 Johns. 90.

We need cite no authorities to sustain the statement that appellee is liable to third parties for the acts of Anderson, although wrongful or fraudulent as between them, if such acts are "within the scope of his (Anderson's) authority." It does not appear that appellants had any occasion to, or that they did, investigate as to Anderson's authority to indorse the checks they had given. They were prudent and cautious enough to make the checks payable to the order of appellee. No duty rested upon them to follow the checks and see that they were properly indorsed before any one took them. When the Northern Trust Company took those checks, it did so at its peril as to the validity of the indorsement. The indorsing of the checks in question by Anderson was within the scope of his authority. Appellee, then, should not be permitted to say, "It is true Anderson was my attorney in fact, authorized to indorse my name upon checks payable to my order for deposit in my bank, but that was intended by me to apply only to checks received by him in the proper management of my business, and he willfully perverted the power vested in him to do something more than I designed or intended, and therefore I should not be liable for his acts." *T. W. & W. R. R. Co. v. Harmon*, 47 Ill. 298, 308.

The case of National Bank of Las Vegas v. Oberne, 121 Ill. 25, is cited by counsel for appellee with the remark that "this case in its facts, is absolutely parallel to the case at bar." We do not so read it. In that case the precise authority of the agent does not appear. From the statements in the opinion of the court and the arguments of counsel, we understand the facts to be that Thomas Davis was at Las Vegas the agent of Oberne & Co., a Chicago firm; that when Davis made purchases there for that firm, he drew drafts on them and deposited the same in the appellant bank; that the amount of such drafts were by the bank passed to the credit of the firm; that Davis was authorized to check out of the bank only the amount or proceeds of the drafts thus drawn and deposited by him, and that he had no authority to bind Oberne & Co. by indorsement or guaranty. Davis applied to the bank to discount a promissory note which he had taken for money loaned and which was made payable to the order of Oberne & Co. The cashier of the bank wrote on the back of the note an indorsement and guaranty. To that was signed the name of Oberne's firm by said Davis, and the amount of the note was passed to the credit of the firm. The whole amount was afterward checked out upon checks signed "Oberne, Hosick & Co., per Thomas Davis." A portion of those checks were given in payment for purchases made by Davis for said firm, and a portion were for Davis' personal use. The note not being paid, the Las Vegas bank sued Oberne & Co. upon said guaranty indorsed upon said note. The holding by the Supreme Court was that Oberne & Co. were liable for that portion of the proceeds of said note which was checked out and paid by Davis for stock purchased by him and shipped to said firm, but were not liable for the portion checked out by Davis for his own use.

The Oberne case was a proceeding by the bank against the depositor. To make the case at bar parallel with that case as to parties, it should have been brought by the Northern Trust Company against Fay, the appellee. The maker of the note which Davis had guaranteed in the Oberne case

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did not pay the note. Suppose the bank upon which the appellants' checks were drawn had declined to pay them, and the Northern Trust Company had sued appellee for the amount of same, which had been passed to his credit and checked out by Anderson. That would have made a case nearly or quite parallel to the Oberne case. But surely it will not be contended that in the supposed case appellee could successfully interpose the objection that Anderson was not authorized to make the indorsements which were made upon the checks in question and deposit the same to appellee's credit. The defense in the Oberne case was not based upon the fact that Davis had checked the money out improperly, but upon the fact that he had no authority to guarantee the note. The Oberne case is not parallel to or decisive of the case at bar, as is so strenuously and repeatedly urged.

Neither is the position of appellee tenable that "It was Slaughter, and not Fay, who put it into the power of Anderson to steal this money." It was by reason of the authority given by Fay to Anderson by the power of attorney that the latter was able to get the money into the bank to the credit of Fay. It was by reason of the same authority conferred in the same manner that Anderson could check the money out of the bank and steal it. If Anderson had not been vested with this authority by Fay, he could not have secured the control of the money called for by appellants' checks in any way which would have been binding upon appellants.

We are of opinion, as stated by counsel for appellants, that "the fact that appellee did not have appellants' money in his possession and control when this suit was brought, because, after it came to his possession and control, it was drawn out by Anderson acting under a power of attorney, of whose existence appellants were ignorant, is no defense to this action."

Each partner is an agent of his firm and of the other members of the firm, in the matter of the firm business. Anderson was the agent of appellee. The principal is

bound by the acts of the agent, within the scope of his authority, in one case as much as in the other.

The case of *Marsh v. Keating*, 2 Clark & Fin. 250, arose out of the notorious Fauntleroy forgeries in London in 1819. The report of the case is quite voluminous, and it is a leading case. It appears that one Fauntleroy, a member of the firm of Marsh & Co., bankers, forged a power of attorney to the firm from one of its customers named Ann Keating, by virtue of which he transferred £9,000 of annuities registered in the name of Mrs. Keating at the bank of England, and sold the same through a broker. The firm kept a bank account with Martin, Stone & Co., and the broker deposited the net proceeds of the sale of the annuities with this banking house to the credit of Marsh & Co. The money was then drawn out by Fauntleroy on checks signed by him with the firm name, and was converted to his own use. The firm of Marsh & Co. consisted of four members, neither of whom, except Fauntleroy, knew of his transactions, and they were not entered upon the books of the firm, neither did the firm receive any benefit from the transactions. The question in the case was whether Ann Keating could maintain an action for money had and received against the firm of Marsh & Co. Held, that the action could be maintained. The House of Lords, by Mr. Justice Park, said (p. 289):

“Fauntleroy, one of the partners, deceived the others by preventing the money from being ultimately brought to the account of the house; but as between them and the person by the sale of whose stock it was produced, we think the fraud of their partner, Fauntleroy, in the subsequent appropriation of the money, affords no answer after it had once been in their power.”

The same question was involved in the case *In re Ketchum*, 1 Fed. Rep. 815. In that case it appears that the firm of Ketchum & Belknap was engaged as brokers in buying and selling stocks for customers. Belknap was intrusted individually for safe keeping with large amounts of stocks and securities belonging to Morris, kept in a tin box, of which he retained the key. Morris, the owner of

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the stocks and securities, kept a deposit account in a bank, and Belknap had a power of attorney from him to check upon this account, but had no authority to draw money, except for the proper use and benefit of Morris, and no authority to use or dispose of the stocks and securities except by the order of Morris. Belknap drew checks against the bank account, and deposited the checks to the credit of his firm, without the knowledge of his partner, and sold and disposed of some of the stocks and securities, and deposited the proceeds in the bank to the credit of his firm, and used other stocks and securities by hypothecating them for loans to his firm. The firm failed and went into bankruptcy, and the case arose upon the right of the defrauded party, Morris, to prove his claims against the bankrupt estate of his firm. It was objected that the claims could not be proved, because the fraudulent acts of Belknap, done without the knowledge of his partner, could not bind the firm, and that the firm received no benefit from the transactions, because Belknap drew out, for his personal uses, the moneys deposited to the credit of the firm.

The court (Choate, J.) said (p. 831, *et seq.*):

“The case of *Marsh v. Keating* can not, I think, be distinguished in principle from the present case. * * * That case discloses that the plaintiff was a customer of the defendants’ firm, but the liability of the defendants is not rested at all, on any fiduciary relation between the firm and the plaintiff, as respects her stocks, but wholly, as it seems, on the receipt of her money. * * * The point made by the opposing creditors, that F. M. Ketchum, or the firm, is not liable, because Belknap, after the deposit of these moneys, drew out all or some of them for his own personal uses, is untenable. If, by the receipt of the money, the firm was made chargeable with it, it is no answer that the firm was afterward robbed of it or a part of it; much less that a member of the firm, being authorized to draw checks on the firm’s bank account, abused that authority by drawing for purposes not authorized by the agreement between the partners.”

Counsel for appellants requested the trial court to give to the jury several instructions, but the court refused to pass

upon said instructions, and refused to give them or either of them to the jury, and instructed the jury that appellants were not entitled to recover, and to find a verdict for the appellee. The second and third of said instructions are as follows, viz.:

2. "If the jury believe from the evidence that the defendant's bank account was permanently benefited by the money obtained by Anderson from the plaintiffs, they will find and render a verdict in favor of the plaintiffs and against the defendant for the amount of such benefit as found by them from the evidence."

3. "If the jury believe from the evidence that Anderson, claiming to act as the agent of the defendant, obtained money from the plaintiffs upon the sale or pledge of the shares of stock in the Chicago Edison Company mentioned in the evidence, with indorsements of said defendant upon their back, which indorsements had been previously forged by said Anderson, and that said Anderson used portions of such moneys so obtained to replace moneys previously embezzled by him from said defendant, and the balance of such moneys or some portions thereof for the use and benefit of said Fay in his legitimate business, then the jury are instructed that said defendant is liable to said plaintiffs in this action for so much of such moneys as were used by said Anderson to replace money previously embezzled by him from said defendant, and also for so much of the balance thereof as was used by said Anderson for the use and benefit of said defendant in his legitimate business."

There is testimony tending to show, and which it is contended by appellants conclusively establishes, that a portion of the money collected upon the checks given by appellants was paid and used for appellee's benefit and to pay his debts. If it be true that a portion of that money was so used, then appellants were entitled to recover the same from appellee, because it was so used, without regard to the question of whether it came rightfully into the bank to the credit of appellee. See the Oberne case, *ante* (121 Ill. 25). The jury should have been instructed upon this point and should have been permitted to determine what the facts are in that regard.

But we prefer to place our decision upon the main ques-

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tion that it was error to instruct the jury that appellants are not entitled to recover, and to direct them to find a verdict for the appellee.

The judgment of the Superior Court is reversed and the cause remanded.

**Albert S. Tyler and Louis A. Hippach, Copartners as
Tyler & Hippach, v. Benjamin Hyde and
W. H. Winslow.**

1. **PAYMENT—Acceptance of a Second Note.**—The giving of a second note for the same debt does not necessarily extinguish liability upon the first note, and whether such second note was accepted as payment or merely as additional security is a question of fact.

2. **SAME—Taking a Second Note for the Same Debt—Whether Payment or Additional Security.**—If the giving of a second note extinguishes the liability upon a first note given for the same debt, it can only be by reason of an express agreement of the parties to that effect, and in the absence of such agreement, the presumption prevails that the second note was for additional security and not a payment.

Assumpsit, on a promissory note. Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Finding and judgment for defendants. Error. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed February 9, 1899.

Benjamin Hyde, one of defendants in error, obtained credit from plaintiffs in error to the extent of \$3,000, upon giving a note for that amount, signed by himself and also signed by defendant in error Winslow as a guarantor. The note bore date April 1, 1896, and was by its terms payable thirty days thereafter. Payments amounting to \$700 were made by Hyde. After maturity of this note, Hyde gave to plaintiffs in error a note for \$2,350, secured by a trust deed, the \$2,350 being the balance then due upon the \$3,000 note. This second note was not signed by Winslow, the guarantor of the first note. The suit here was brought upon the first

note against Hyde, maker, and Winslow, guarantor. The general issue was pleaded and later two special pleas were interposed which, in effect, averred that the \$3,000 note, sued on, had been paid by the giving of the note for \$2,350 and that said note for \$2,350 had been accepted by plaintiffs in error in full satisfaction and discharge of the \$3,000 note. Such payment and discharge by reason of the taking of the second note was disputed by plaintiffs in error, and the issue presented by these pleas of payment and replications thereto, was the only issue submitted to the jury. No question was raised in the court below as to any release of the guarantor, except as he would have been released by payment. The circumstances of the giving of the second note, *i. e.*, the secured note for \$2,350 from which defendants in error seek to have drawn a conclusion of payment, were as follows: When the \$2,300 note was given, it was secured by a trust deed conveying certain real estate, and a contract for sale of real estate was also given as additional security. Hyde testified that upon the giving of the new note and securities, Hyde asked Tyler to "give back the old note." Tyler replied that "he was willing to give back the old note if I would pay him the \$1,200, otherwise he was going to hold that, to be certain he would get his money; since if I could not pay him the note and he was obliged to sell the property, he would have Winslow on the old note. I then asked him if he would put that agreement in writing, that he would release Winslow on a payment of \$1,200, and he did so." The written agreement was as follows:

"The undersigned hereby agree that upon payment by Benj. Hyde of his certain promissory note for twelve hundred dollars, dated Nov. 30th, 1894, and due on or before two years from that date, to Andrews & Piper for balance of purchase money on lots 8, 9, 10, block 20, in Berwyn, together with all costs of collection, if any, they, the undersigned, will return to said Benj. Hyde his note for three thousand dollars, dated April 1, 1896, due in thirty days thereafter, indorsed by W. H. Winslow, and cancel said evidence of indebtedness.

TYLER & HIPBACH."

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Tyler (one of plaintiffs in error) testified that Hyde made no demand for a return of the original note; that plaintiff in error took the \$2,350 note only as additional security, and that he so told Hyde at the time. He also testified that in connection with the giving of the new note Hyde had informed him that he was about to have a judgment entered against him; that he told Hyde that he ought to give him better security, and that he, Tyler, seemed unable to protect the note without suit. Tyler examined into the value of the real estate conveyed to secure the second note before accepting it. The note for \$2,350 was, by its terms, payable on or before two years after its date, January 18, 1897. On the back of the original note was written, "I hereby guarantee payment of the within note. W. H. Winslow." "I hereby agree to an extension of time and guarantee payment of this note, or balance due thereon, at this date, October 24, 1896. W. H. Winslow."

Both notes were produced upon the trial.

Upon the issue presented, viz., payment of the note sued on, the jury found for the defendants. From judgment upon the verdict this appeal is prosecuted.

GILBERT & GILBERT, attorneys for plaintiff in error; KIRK HAWES, of counsel.

If a bill or a note is not surrendered the presumption is that it is not paid. Chitty, page 446; Buzzard v. Flacknoe, 1 Stark. 328; Brownbridge v. Osborn, 1 Stark. 374; 3 Randolph on Com. Paper, par. 1415, page 478.

The giving of a promissory note for a pre-existing debt does not pay or discharge the debt unless there be an absolute agreement to take the note in payment. Walsh v. Lennon, 98 Ill. 27; Bond v. The L. & L. & G. Ins. Co., 106 Ill. 654; Hercules Iron Works v. Hummer, 49 Ill. App. 598; Schumacher v. Edward P. Allis Co., 70 Ill. App. 556; Chisholm v. Williams, 128 Ill. 115; Wilhelm v. Schmidt, 84 Ill. 183; Cheltenham S. & G. Co. v. Gates Iron Works, 124 Ill. 623; 1 Edwards, Negotiable Paper, par. 286, page 201; 1st of Cowen's Reports, 359; Bill v. Porter, 9 Conn.

23; Sweet v. Titus, 67 Barb. 327; League v. Waring, 85 Penn. St. 244; 18 Am. and Eng. Encyclopedia of Law, 167.

The burden of proof is on the debtor to show that the note was both given and received as absolute payment. *Hercules Iron Works v. Hummer*, 49 Ill. App. 598; *Johnson v. Weed*, 9 Johns. 310; *Nightingale v. Chaffee*, 11 R. I. 609; *Merrick v. Boury*, 4 O. St. 60; *Haines & Eppley v. Pierce*, 41 Md. 221; *Glenn v. Smith*, 2 Gill & J. 493; *McMurray v. Taylor*, 30 Mo. 263.

The taking of a promissory note for a pre-existing debt in the absence of an agreement to the contrary is considered as additional payment or collateral security. *Medley v. Specker Bros. & Co.*, 58 Ill. App. 157.

The general rule is that an action upon a primary debt and upon the collateral security may be prosecuted at the same time, even to judgment, though only one satisfaction can be obtained. *Com. Ins. Co. v. Babcock*, 57 Barb. 231; *Ripley v. Greenleaf*, 2 Vt. 129; *Auburn Bank v. Hunsiker*, 72 N. Y. 252; 3 Rand. on Com. Paper, par. 1677, page 782.

MORAN, KRAUS & MAYER and JOSEPH W. ERRANT, attorneys for defendants in error.

The question of whether it was intended or understood that the prior draft was paid by the acceptance of the new draft is, therefore, both upon authority and principle, a question of fact, not of law. It was competent for the jury, or, in this case, the court sitting as a jury, to consider all the attending circumstances proved, and deduce therefrom the understanding or intention of the parties in respect thereto. *Belleville Savings Bank v. Bornman*, 124 Ill. 200.

When a subsequent promissory note is given for the same consideration as a former one, it is a question of fact for the determination of the jury whether the former note is thereby satisfied. *Yates v. Valentine*, 71 Ill. 643.

MR. JUSTICE SEARS delivered the opinion of the court.

The only question necessary to be considered is as to the sufficiency of the evidence to sustain the verdict. But one

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issue of fact was submitted, viz.: was the second note accepted in payment of the note sued on, or was it merely given as additional security? The giving of the second note for the same debt did not necessarily operate to extinguish the liability upon the first note. *Wilhelm v. Schmidt*, 84 Ill. 183; *Walsh v. Lennon*, 98 Ill. 27; *Bond v. The L. & L. & G. I. Co.*, 106 Ill. 654; *S. & G. Co. v. G. I. Works*, 124 Ill. 623; *Chisholm v. Williams*, 128 Ill. 115.

These decisions distinctly hold that if the giving of the second note operated to extinguish liability upon the first note, *i. e.*, the note sued on, it could only be by reason of an express agreement of the parties to that effect. In the absence of any such agreement, the presumption would prevail that it was additional security and not a payment.

It may be that such an express agreement might be established by facts and circumstances surrounding the transaction, as well as by a more formal and distinct contract. *Wilhelm v. Schmidt*, *supra*. But the facts here all indicate that the parties did not regard the giving of the second note as a payment of the first. Hyde says that Tyler refused to surrender the first note, and insisted that he would retain it to hold Winslow until a \$1,200 note, secured by a first mortgage upon the real estate conveyed to secure the \$2,350 note, should be paid. The note sued on was not surrendered, but retained by plaintiffs in error. The written undertaking by plaintiffs in error to release Winslow upon the payment of the \$1,200 note, is also wholly inconsistent with a payment of the first note by the giving of the second.

There can not be said to be any evidence in the record here sufficient to sustain a finding to the effect that there was a payment of the first note. The verdict, as being clearly against the weight of the evidence, should have been set aside and a new trial should have been awarded.

The judgment is reversed and the cause remanded.

George M. Clark & Co. v. William D. Kent, Samuel A. Treat, John R. True and Thomas S. Dobbins.

1. **CONSTRUCTION OF STATUTES—*Inserting Words—Sec. 18 of the Act Concerning Corporations.***—Section 18 of Chapter 25, R. S., entitled “An Act Concerning Corporations,” is to be construed the same as if the word “or” had been inserted between the word “act” and “before” as they occur in the latter part of the section. (*Loverin v. McLaughlin*, 161 Ill. 417.)

2. **CORPORATIONS—*Individual Liability of Directors.***—Under section 18 of the act concerning corporations, if the board of directors of any stock corporation, or pretended stock corporation, assume to exercise corporate powers, or use the name of any such corporation or pretended corporation, before all stock named in the articles of incorporation is subscribed in good faith, they become jointly and severally liable for all debts and liabilities made by them and contracted in the name of such corporation or pretended corporation.

3. **SAME—*Where the Stock is Not Subscribed for in Good Faith.***—Where the persons named in articles of incorporation as subscribers to the stock, subscribe with no intention of ever paying or being called upon to pay the amount of their several subscriptions, but make the subscriptions with the idea that they are merely acting as agents for other persons whose names are not disclosed in said articles, the stock named in said articles of incorporation has not been subscribed in good faith within the meaning and intent of said section 18 of the act concerning corporations.

4. **SAME—*Directors Must See that the Stock is Subscribed for in Good Faith.***—The directors of a stock corporation are required to see that all stock named in the articles of incorporation has been subscribed in good faith, otherwise they may be held personally liable, jointly and severally, for the debts of the corporation contracted for by them.

5. **SAME—*Fictitious Subscriptions—Intention of the Statute.***—The intention of the statute relating to the organization of corporations is to secure the public, dealing with corporations, against the evils of illegal or incomplete organization, and fictitious subscriptions, by placing upon the managing officers or directors the responsibility of seeing to it that the provisions of the incorporation act shall be fully complied with, and that the subscriptions to the capital stock shall be made in good faith.

Action under section 18 of the act concerning corporations to hold directors liable for merchandise sold and delivered, etc. Trial in the Superior Court of Cook County. The Hon. THEODORE BRENTANO, Judge, presiding. Finding and judgment for defendants; appeal by plaintiffs. Heard in this court at the October term, 1898. Reversed, and judgment entered here. Opinion filed February 9, 1899.

STATEMENT.

This action was begun by appellant against appellees, the directors of the Dubuque Building Company, an Illinois corporation, now insolvent, to recover for merchandise sold to the corporation. The suit was brought under section 18 of the corporation act, to hold appellees as directors personally liable, jointly and severally, because they assumed to act as directors of the corporation and contracted debts in the name of the corporation, and otherwise exercised corporate powers, before all the capital stock named in its articles of incorporation had been subscribed in good faith.

The Dubuque Building Company was organized on August 10, 1894. On that date the articles of incorporation were recorded in the office of the recorder of deeds of Cook county. From these articles of incorporation it appears that John S. Brown, Walter H. Browne and James E. Dement signed the usual preliminary statement that they desired to form a corporation, to be known as the Dubuque Building Company; that its object was to operate an apartment building in Chicago; its capital stock, \$100,000; the number of shares, 1,000; the amount of each share, \$100; its duration, ninety-nine years; its principal office in Chicago. It further appears by the report of two of said commissioners, Walter H. Browne and James E. Dement, that they opened books of subscription; that the stock was fully subscribed; that the following is a true copy of such subscription:

“We, the undersigned, hereby severally subscribe for the number of shares set opposite our respective names, to the capital stock of Dubuque Building Company, and we severally agree to pay the said company for each share the sum of one hundred dollars, in such manner and at such time or times as the board of directors may determine:

NAMES.	SHARES.	AMOUNT.
W. J. Price,	1	\$ 100
Walter H. Browne,	995	99,500
Frederick P. Austin,	2	200
John S. Brown,	1	100
Fred W. Hatch,	1	100.”

It further appears from said report that the commissioners convened a meeting of said subscribers by notice, pursuant to law; that said subscribers met and elected as directors E. J. Price, Walter H. Browne, John S. Brown, Frederick P. Austin and Harry B. Gutches. This report of the two commissioners, Walter H. Browne and James E. Dement, is sworn to; they make oath that "the foregoing report by them subscribed is true in substance and in fact."

Immediately after filing the articles of incorporation, the company proceeded in the work of erecting an apartment building, known as the Dubuque Apartment Building in Chicago; it continued in business until December 23, 1895, when it made a voluntary assignment for benefit of creditors to John S. Brown, assignee. A part of its indebtedness was a claim of \$660 of George M. Clark & Company, appellant, for gas ranges and labor, furnished the building under written contract made in April, 1895. At the time this contract was made the appellees, William D. Kent, Samuel A. Treat, Thomas S. Dobbins, and John R. True, were the managers or directors of the company, and had been for some time prior thereto, and continued to be up to the time of the assignment in December, 1895. William D. Kent was the president, Samuel A. Treat the secretary and John R. True the treasurer of the company. On the trial the following stipulation was entered into in open court:

"That on or about April 17, 1895, George M. Clark & Company made a written contract with the Dubuque Building Company for the furnishing of gas ranges for the Dubuque building; that the ranges under said contract were actually furnished and went into the building, and that at the time of the assignment, December 23, 1895, there remained due from the Dubuque company, for goods furnished under said contract, the sum of \$660, none of which has been paid."

The declaration contained two special counts and the common counts. The first count is drawn on the theory of the Dubuque company *being* a corporation; the second count on the theory of it being a *pretended* corporation; the sec-

ond count is almost exactly like the first count, save where, in the first count, the words "stock corporation" are used, in the second count the words "pretended stock corporation" are used, and save where in the first count the words "being the board of directors" are used, in the second count the words "pretending to be the board," etc., are used. The first count alleges, in substance, that on December 23, 1895, and at divers times prior thereto, beginning with January 10, 1895, the defendants, being the board of directors of the stock corporation, Dubuque Building Company, assumed to exercise corporate powers and use the name of said corporation before all the stock named in the articles of incorporation of said corporation was subscribed in good faith, and so being and assuming, purchased of the plaintiff in the name of the corporation certain goods, etc., at divers times, etc., of the value, etc., and that said goods so purchased were delivered, etc., whereby, and by force of the statute, the defendants became jointly and severally liable to pay, etc., and being so liable, in consideration thereof promised to pay, etc. Four pleas were interposed: (1) the general issue; (2) denial of joint liability; (3-4) estoppel pleas on ground that plaintiff filed its verified claim against the Dubuque company with the assignee on March 31, 1896. Demurrers were interposed to the third and fourth pleas and were sustained, leaving two pleas, viz., the general traverse and the denial of joint liability, upon which issues were joined.

The evidence disclosed the following facts: Singleton, owner of the fee, agreed with Bradley to sell the fee to Bradley, and to take back a lease for 198 years, and to erect an apartment building upon the property. Bradley was to pay \$100,000 for the fee, \$42,000 of which was paid upon delivery of deed and \$58,000 was to be paid when the building was completed. Singleton assigned his lease to a corporation known as the Carolina Building and Hotel Company. That company began the erection of the apartment building, and failed, through financial embarrassment, to complete it. Among its creditors were appellees, or

companies or firms in which they were interested, who furnished material and did contract work upon the building. In an effort to save themselves as creditors of the Carolina company, they undertook to complete the enterprise. To that end the corporation here in question, the Dubuque Building Company, was organized. An agreement was made by Bradley that he would pay over to the Dubuque Building Company the balance of purchase price due upon completion of the building, which had become reduced to \$55,000, instead of \$58,000, and which later became reduced, by reason of accruing ground rent, to \$53,000. An agreement was made with the Carolina company to permit it to redeem upon certain terms, one of which was that upon such redemption the Carolina company should be credited with the \$53,000 paid by Bradley, as by the original agreement, *i. e.*, the \$53,000 should not be figured as part of redemption money to be paid by the Carolina company. There were in all twelve creditors of the Carolina company who thus undertook to organize the new company, viz., the Dubuque Building Company. But they chose certain ones of their number to act for them in the premises. The incorporation of the Dubuque Building Company followed. None of these creditors, however, and none of appellees, became, at the organization, publicly identified with such organization. Instead, certain individuals, having no interest in the matter of the proposed incorporation, were induced to sign the preliminary papers, to subscribe for the capital stock, and to become the first board of directors. It is conceded that no one of these original incorporators was a *bona fide* subscriber. On the contrary, it appears to have been distinctly understood that no one of them assumed any responsibility whatever or had the slightest intention of ever paying any part of the amount of his subscription. There is no attempt to maintain the fiction that Browne, who subscribed for 995 shares of the capital stock, paid for the same by transfer of leasehold, or in any other manner.

It appears from the evidence that the only intention of appellees, and the contractors whom they represented, was

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to pay for stock to the extent of whatever credit might be due to them for work and material upon the building, partly furnished during the management by the Carolina company, and partly furnished during the Dubuque Building Company's management. It was understood that all of the capital stock should be distributed among these contractors; but no understanding was had or obligation assumed by them as to any cash payments for such stock.

The total amount of receipts by the Dubuque Building Company from the time of its organization up to the date of its assignment, is made up as follows :

William L. Bradley, in cash, in accordance with the agreement of April 5, 1894, and which was a part of the original purchase money for the land which Bradley agreed to pay Singleton.....	\$53,000
Labor and material paid for by sale of bonds secured by trust deed on property to amount of..	54,100
Rents from tenants (cash).....	6,639
Labor and material from contractors who were paid in stock.....	45,800
Cash from a stockholder to strike a balance on an issue of stock for material furnished.....	14
Total receipts.....	\$159,553

Mr. Treat, one of appellees, testified :

"I was among others who agreed to take their pay in stock. There is no record of any subscription by me or the others. It was a verbal understanding. There was no written subscription made by us. We agreed to subscribe for the entire issue of stock for finishing up this building, and took our pay in stock. We did not put our names to anything, because none of us at that time knew what the exact amount would be. It was impossible for each of us to know how much stock we were to receive, because we did not know how much our bills for labor and material would amount to. I could not tell how much I would take because I did not know how much the building would cost. I could not fix the amount. I want to be understood that these men (the contractors) subscribed for the entire issue, and that each individual would take stock only when the building was finished.

Q. When you said a little while ago that there was an agreement for the parties composing this syndicate to subscribe for the stock, you did not mean that literally, did you? There was not any agreement that each one of these would subscribe any specific amount, before the corporation was organized, was there? A. No; there was not.

Q. Your recollection of the understanding was that Mr. Browne subscribed these \$99,500 as a matter of convenience, and that this stock, that was to go to these several creditors after they had worked on the building, was to come from this block of stock which had been originally subscribed by Walter H. Browne? A. That is it."

Mr. True, one of appellees, testified:

"I was elected to fill a vacancy in the Dubuque Building Company directory about September 26, 1894. I knew that the company from day to day was incurring liabilities for materials and labor. I knew that these gentlemen (the original subscribers) had signed the original subscription to the stock of the company, but I made no inquiries as to their financial responsibility."

Q. When you were elected a director and became treasurer of the company, was it the understanding that the directors or the stockholders, that were made up of the creditors of the old Carolina company, should pay in any money into the corporation? A. It was understood that these contractors should pay for their stock with labor and material; but that they should not put in any money.

The Court: I want to ask you, Mr. True, the amount of stock that you were entitled to. Was it in payment of the work already done on the Carolina building, and the work you did subsequently on the Dubuque building?

A. Yes, sir; for both. That is the way the contractors were to get their pay.

Mr. Elliott: Is it not true, Mr. True, that in case the amount of work done should not equal the amount of stock, that is, if there should be any stock remaining after it had been apportioned to these contractors for work done, that what was left should be divided in proportion to what they had received; that is, if the building cost \$50,000 to complete it, the remaining fifty should be divided among all of them, in proportion to the amount they had already received? A. Yes, sir.

Mr. Gridley: Were you to pay that remaining \$50,000 in cash? A. My impression is, it was to be paid for with the money that came from Bradley, with the lease.

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The Court: Supposing, after everybody was paid, there was a certain amount of stock left over; was that to be a gratuitous distribution, and was that to be distributed in proportion to the amount already received?

A. My understanding was, it was to be distributed *pro rata*. The money that came from the lease was to pay that up; that was my understanding of the matter.

Mr. Gridley: Was there any arrangement at all that the members of this syndicate, including yourself, were personally liable to somebody for that balance of the stock?

A. Not that I know of."

It is practically undisputed that neither Browne, who subscribed for 995 shares, nor any other of the subscribers to the stock, was a *bona fide* subscriber.

On cross-examination Mr. Browne testified:

"When I signed this stock subscription list, I acted for the contractors who had been building the building that was afterward known as the Dubuque building. I did not subscribe for any stock myself on my own account. I did not consider that I was incurring any liability when I signed it. I never agreed to take any stock in the Dubuque company. I never attempted to pay anything for this lease. I did not have any interest in the lease which was assigned to me. I did not ever get anything for any of the stock. I did not attempt to pay for any of the stock by lease. I considered that I was representing the contractors who had been completing the Dubuque building. I did not say anything to Mr. Partridge nor to anybody else at the time as to having a new certificate for any number of shares re-issued in my name. I did not sell to anybody any part of these 995 shares of stock; I just surrendered them to the company. No one ever suggested to me that I should subscribe for this stock in the Dubuque company about to be formed. Mr. Oliver asked me to sign the subscription list, and I did so."

Counsel for appellees made the following admission upon the trial:

"There is no contention here that Mr. Browne was able to pay for that stock. He did not subscribe for it; he never intended to pay a dollar on it himself; he did not take it himself."

There is no controversy as to the amount due to appel-

liant, nor as to the fact that the indebtedness was incurred by appellees in the name of the corporation.

The issues were submitted to the court below, without a jury, and the finding and judgment of the court were for appellees, defendants there.

PADEN & GRIDLEY, attorneys for appellant.

The statute requires that the stock "named in the articles of incorporation" must be subscribed in good faith. *Loverin v. McLaughlin*, 161 Ill. 417; *People v. Chicago Gas Trust*, 130 Ill. 268.

The statute says "subscribed" in good faith, not paid. *Diversey v. Smith*, 103 Ill. 378.

What is "good faith" in a stock subscription? See 2 Am. & Eng. Ency. Law, 447 (note); 8 Am. & Eng. Ency. Law, 1361; *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242; *Thompson on Corp.*, Secs. 1724-1726; *Holman v. State*, 105 Ind. 569; *Whetstone v. Crane Co.*, 1 Kan. App. 320.

Persons attempting to incorporate under a general statute are held to a strict compliance with the statutory provisions. *Beach on Pri. Corp.*, Sec. 16; *Bigelow v. Gregory*, 73 Ill. 197; *Kaiser v. Bank*, 56 Iowa, 104; *Abbott v. Omaha Co.*, 4 Neb. 416.

However honest in intention they may have been is immaterial. *Beach on Pri. Corp.*, Sec. 16; *Kaiser v. Bank*, 56 Iowa, 104; *Trust Co. v. Floyd*, 47 Ohio St. 525; *Whetstone v. Crane Co.*, 1 Kan. App. 320.

The statute requires that the stock shall be subscribed by the subscribers, and none of the members of this syndicate, subscribed to any stock, either in the original articles, or in any outside subscription, by which they may be bound. *Century Dictionary* (Subscribe); 24 Am. & Eng. Ency. Law, 326; *Fanning v. Ins. Co.*, 37 Ohio St. 339; *Vreeland v. N. J. Stone Co.*, 29 N. J. Eq. 188; *Tonica R. Co. v. Stein*, 21 Ill. 96; *Thrasher v. Pike Co. R. Co.*, 25 Ill. 393; *Stowe v. Flagg*, 72 Ill. 397.

The report of the commissioners, sworn to, in the articles of incorporation, estops defendants from assuming this

position. *Loverin v. McLaughlin*, 161 Ill. 417; *Appeal of Rowley*, 115 Penn. 150; 9 Atl. Rep. 329.

The general rule, supported by the concurrence of most of the courts, is that where the charter or governing statute fixes the amount of capital which the corporation shall have, and does not authorize it to commence business with a less amount, no assessment can be made upon the subscribers until the capital so fixed has been all filled up by *bona fide* subscribers. *Thompson on Corp.*, 1724.

“Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious.” 8 Am. & Eng. Ency. Law, 1361.

This court should not only reverse the judgment of the lower court, but enter judgment against the appellees, and in favor of the appellant, in the sum of \$660.

The statute confers the right to do so. Secs. 80 and 87, Chap. 110, R. S. Ill.

The decisions sustain such practice. *Manistee Lumber Co. v. Bank*, 143 Ill. 490; *Everts v. Lawther*, 165 Ill. 487.

EDWARD STARTZMAN ELLIOTT, attorney for appellees.

All the stock was subscribed in good faith as required by the statute, because responsible persons manifested an honest intention to acquire the ownership of the entire issue of stock; and whenever an intent to become a subscriber is manifested, the courts hold, without particular reference to formality, that the contract of subscription subsists. Sec. 18, Chap. 32, R. S. Ill.; *Cook on Stock & Stockholders*, Sec. 52; 23 Am. & Eng. Ency. of L. 786.

In no instance is it necessary for a party to sign his own name in order to become the principal to a contract; but whether a party shall be considered as acting for himself or as the agent of another depends, not upon the fact that he contracted in his own name without disclosing his agency, but upon the facts and circumstances in the case.

Parol evidence is always admissible to show that an additional party is the real principal, and when this fact is disclosed he is bound as such, regardless of who signed for him. *Collins v. Butts*, 10 Wend. 400; *Fishback v. Brown*, 16 Ill. 74; *Ford v. Williams*, 21 How. (U. S.) 239; *Higgins v. Senior*, 8 M. & W. 144; *Bynington v. Simpson*, 134 Mass. 169.

No particular form of stock subscription is necessary, and even without a formal subscription, or where it is irregular, the courts have uniformly held that the contract of subscription may be inferred from acquiescence and acceptance of the benefits of membership in the corporation; and in this particular case the syndicate of contractors not only acquiesced in the subscription, and put themselves in a position to receive any possible benefits that might result from membership in the corporation, but they likewise promptly assumed the liabilities and responsibilities of membership as well. *Boggs v. Olcott*, 40 Ill. 303; *Jewell v. Rock River, etc., Co.*, 101 Ill. 57; 23 Am. & Eng. Ency. of L., 786.

MR. JUSTICE SEARS delivered the opinion of the court.

Section 18 of the Corporation Act provides as follows:

“If any person or persons being, or pretending to be, an officer or agent, or board of directors, of any stock corporation, or pretended stock corporation, shall assume to exercise corporate powers, or use the name of any such corporation, or pretended corporation, without complying with the provisions of this act, (or) before all stock named in the articles of incorporation shall be subscribed in good faith, then they shall be jointly and severally liable for all debts and liabilities made by them, and contracted in the name of such corporation, or pretended corporation.”

The word “or” included above in brackets, is not written in as a part of the statute. But the Supreme Court have so construed section 18, as to make it operate as if the word “or” had been so written in as a part of it. *Loverin v. McLaughlin*, 161 Ill. 417.

The statute as so construed operates, therefore, to make directors of a corporation personally liable for all debts and

liabilities made by them, and contracted in the name of the corporation before all the capital stock named in the articles of incorporation has been subscribed in good faith.

The question presented here is whether upon the facts of this case all the capital stock of the Dubuque Building Company named in its articles of incorporation had been subscribed in good faith when appellees incurred the debt and liability to appellant in the name of that corporation.

It is admitted that no such *bona fide* subscription had been made by the ostensible subscribers who signed their names to the subscription list. But it is contended that they were but acting for appellees and others, the contractors, and that the contractors were in reality the *bona fide* subscribers. To this we can not assent. In order to constitute them such *bona fide* subscribers, it was essential that they should have intended to have taken and paid for all the capital stock, that they should have obligated themselves to so do, and that their intention and obligation in this behalf should have been published to the world by their signatures to the subscription list. In no one of these particulars were these requisites complied with. They did intend to take all the capital stock, but it is conclusively established by testimony of at least one of their number, which is practically uncontradicted, that they did not intend to pay for all of such stock. Neither did they obligate themselves to pay any subscription beyond such amount as the labor and material furnished might cover. And their names as subscribers, indicating to the public their undertaking and obligation, were not published as subscribers to the capital stock. If they had not chosen to come forward and so declare themselves, the public could not have learned that they were obligated as subscribers to any extent whatever; and now that they do so declare themselves, it is learned that they are not so obligated to the extent of the entire amount of the capital stock named in the articles of incorporation.

There were, then, no *bona fide* subscribers to all of the capital stock when this debt was incurred by appellees in

the name of the corporation. Therefore, they are liable under the provision of section 18 above set forth.

But it is argued that the full amount of stock subscription has been paid, and that such payment is conclusive of the *bona fides* of the subscribers. It appearing that the contractors were not subscribers at all, and it being conceded that they who did subscribe were not *bona fide* subscribers, it is difficult to perceive how any fact, however well established, can be said to conclusively show that which the parties, by their counsel, admit to be untrue. However, the question is obviated by the fact that no such complete payment was ever made. The amounts paid into the corporation, which it is contended constitute such payment in full, are \$53,000 received from Bradley, being the unpaid part of the purchase price of the land, and the \$45,800 of labor and materials contributed by the contractors, and \$14 actually paid in cash. These sums do not, together, make up the \$100,000 subscribed. The amounts received for rent and for bonds issued are not claimed to so apply. Nor can the \$2,000 deducted by Bradley from \$55,000, which he had agreed to pay, apply, nor can any part of the money paid by him be held to have been paid by the subscribers upon their stock subscription. This \$53,000 was not even absolutely an asset of the corporation; for if the Carolina Building Company redeemed, that amount inured to the benefit of that company.

It is argued somewhat strenuously, that the method of organizing corporations here attempted, is a method sanctioned by custom and practice. Whether customary or not, it is a method which, under the provision of the statute and its interpretation by our Supreme Court, imposes a liability upon those thus assuming to act as directors.

In *Loverin v. McLaughlin*, *supra*, the court said of the statute in question:

“The intention was to secure the public, dealing with corporations, against the evils of illegal or incomplete organization, and fictitious or bogus subscriptions, by placing upon the managing officers or directors the responsibility of seeing to it, that the provisions of the incorporation act

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shall be fully complied with, and that the subscriptions to the capital stock shall be made in good faith. * * * The capital stock is not required to be paid in cash, but only to be subscribed. What is to prevent the making of subscriptions by impecunious and irresponsible parties? No provision is made for examination as to the financial ability of the subscribers. But there is provision made in section 18 for careful investigation by the managing officers and directors. They are required to see to it, that all stock named in the articles of incorporation shall be subscribed in good faith."

The judgment of the Superior Court is reversed, and judgment is entered here for \$660, the amount which it is stipulated is due to appellant. Reversed, and judgment here.

Andrew Zembal and Josephine Zembal v. Ignatz Hasterlik, Charles Hasterlik and Samuel Hasterlik; co-partners, doing business as Hasterlik Brothers.

1. **GARNISHMENT—*Joint Judgment Can Not be Rendered upon Several Claims.***—Parties can not jointly recover judgment against parties in garnishment proceedings where the indebtedness from the garnishees is to one of the parties only.

Attachment Proceedings.—Error to the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Judgment against garnishees, error by garnishors. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed February 9, 1899.

STATEMENT.

Defendants in error were plaintiffs, and plaintiffs in error were defendants, in the trial court in an action of assumpsit, and will be hereinafter referred to as such plaintiffs and defendants. The defendants were sued as Andrew Zembal and Mrs. Andrew Zembal. Mrs. Andrew Zembal was personally served with summons, and the summons was returned not found as to Andrew Zembal. The plaintiffs sued out an attachment in aid of the action. The affidavit for attach-

ment stated an indebtedness of the defendants to the plaintiffs of \$732.39, for goods sold and delivered, the residence of the defendants; that Andrew Zembal had departed from the State with the intention of having his effects removed therefrom, and that Mrs. Andrew Zembal was about to depart from the State with the intention of having her effects removed therefrom. The attachment writ was levied on certain personal property, and was also served on H. Clausenius & Co., as garnishees. July 5, 1895, plaintiffs filed their declaration, in which the defendants were named, "Andrew Zembal and Mrs. Josephine Zembal, sued as Mrs. Andrew Zembal." July 17, 1895, Mrs. Andrew Zembal was, by that name, defaulted, and July 29, 1895, Andrew Zembal, having been served by publication, was also defaulted, and judgment was entered against said defendants for the sum of \$732.39, and special execution was ordered against the property attached, and general execution against Josephine Zembal.

The judgment, after defaulting Andrew Zembal, contains the following: "And it further appearing that the default of the other defendant, Mrs. Andrew Zembal, whose name in all of the proceedings, papers and the record is hereby amended, leave of court being hereby granted to the plaintiffs for that purpose." H. Claussenius & Co., the garnishees, answered July 17, 1895, but, by stipulation of the parties, filed an amended answer July 29, 1895. The amended answer admits an indebtedness to Andrew Zembal of \$1,608.92, denies indebtedness to Mrs. Andrew Zembal, and sets up that June 29, 1895, the Fecker Brewing Company filed in the Circuit Court an affidavit for an attachment against Andrew Zembal, stating an indebtedness from him to that company of \$875.35; that an attachment issued on that affidavit, and was served on said garnishees, and that, in response to interrogatories filed in that suit, they answered, admitting an indebtedness to Andrew Zembal of \$1,608.92, all of which proceedings occurred prior to the service upon them of the writ in the present suit. November 16, 1895, judgment was entered in favor of Andrew Zembal against

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George W. Claussenius and Edward Claussenius (the garnishees), doing business as H. Claussenius & Company, for the use of Ignatz Hasterlik et al., the plaintiffs in the attachment, and the court directed that the balance in the hands of the garnishees should be held by them subject to the further order of the court.

F. W. JAROS, attorney for the plaintiffs in error.

A judgment rendered against persons jointly liable is an entirety, and if void as to one defendant is void as to all. *Shuford v. Cain*, 3 Abb. (U. S.) 302; *Kitchens v. Hutchins*, 44 Ga. 620.

WILLIAMS, KRAFT & RUST, attorneys for defendant in error.

MR. JUSTICE ADAMS delivered the opinion of the court.

The only error urged by plaintiffs in error which we think it necessary to consider, or which they are in a position to take advantage of, is the entry of judgment in the name of Andrew Zembal against the garnishees. The defendants in the suit were Andrew Zembal and Josephine Zembal. The indebtedness of the garnishees was to Andrew Zembal only. Andrew Zembal and Josephine Zembal could not, in their joint names, have recovered judgment against the garnishees for indebtedness due only to one of them. Therefore the judgment against the garnishees was erroneous. *C. & N. W. Ry. Co. v. Scott*, 174 Ill. 413; *Siegel, Cooper & Co. v. Schueck*, 167 Ib. 522; *Nat. Bank of America v. Ind. Banking Co.*, 114 Ib. 483.

As, in view of the decisions cited, the plaintiffs, Hasterlik et al., can not maintain garnishment against Claussenius & Company in the present suit, on the facts disclosed by the record, the defaulted defendants (plaintiffs here) can take advantage of the error in this court.

We find no error in the judgment against plaintiffs in error.

The judgment against the garnishees will be reversed and the cause remanded.

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Missouri and Illinois Coal Company v. Daniel W. Pomeroy.

1. **SALES—*To Be Paid for on Delivery—Requisites of a Recovery.***—In actions to recover damages for the breach of a contract for the sale of coal to be paid for on delivery, by shipment, proof that the vendor notified the vendee that he was unable to ship, relieves the vendee from the necessity of proving that he was able, ready and willing to receive and pay for the coal had it been shipped to him.

2. **DAMAGES—*Failure to Deliver Merchandise Sold.***—Where the vendor fails to deliver merchandise according to his contract of delivery the measure of damages is the difference between the contract price and the market price at the time and place where it should have been delivered under the contract.

3. **DELIVERY—*To Carriers—The General Rule.***—The general rule is that a delivery of goods to a common carrier by the seller, is a delivery to the buyer.

4. **SAME—*Place of.***—Under the contract in this case the court holds that the place of delivery was at Chicago.

Assumpsit.—Trial in the Superior Court of Cook County, on appeal from a justice of the peace; the Hon. PHILIP STEIN, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed February 9, 1899.

STATEMENT OF CASE.

Appellee brought suit against appellant before a justice of the peace, before whom a trial resulted in a judgment for costs against him. He appealed to the Superior Court, where a trial, on the short cause calendar, before the court and a jury, resulted in a verdict in his favor for \$225, from which he remitted \$25, and judgment was rendered in his favor for \$200. To reverse this judgment this appeal was taken.

The evidence on behalf of appellee tends to show that on July 12, 1897, he agreed to purchase of appellant, through its agent, Daniel J. Coffey, ten cars of lump coal at \$1 per ton at the mines (appellee to pay the freight), the same to be shipped to appellee at Chicago at once, with a draft

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attached to the bill of lading, the draft to be paid on arrival of coal and delivery of bill of lading.

The following day, at request of Coffey, appellant gave him the following order in writing, viz.:

“CHICAGO, July 12, 1897.

Mo. & Ill. Coal Co., Turkey Hill, Ill.

Please ship me ten cars lump coal at \$1 per ton F. O. B. mines. You may attach draft to bill lading. Dft. payable on arrival of coal and delivery bill lading.

Resp'y,

D. W. POMEROY.”

Also that the average tonnage of a car of coal is twenty-five tons; that the freight from the mines of appellant to Chicago was \$1.20; that according to the usual custom, the coal should have been delivered at Chicago by the 15th to 17th of July; that on said days' this coal was worth in the market \$3.10 per ton; and that no coal whatever was delivered, and July 24, 1897, appellant notified appellee that it could not fill his order.

The evidence on behalf of appellant tends to show that no contract was made with appellee by appellant, as claimed. The evidence is strongly conflicting, and the right of the case depends upon the credibility of appellee, and appellant's agent, Coffey, who were the only witnesses to the contract in question.

There was no evidence that appellee was able, ready and willing to take and pay for the coal. Among other instructions, appellant asked the court to give the following:

“7. The court instructs the jury that while the law makes the plaintiff a competent witness in this case, yet the jury have a right to take into consideration his situation and interest in the result of your verdict, and all the circumstances which surround him, and give to his testimony only such weight as in your judgment it is fairly entitled to.”

But the court refused to give this instruction to the jury as asked, and modified it by changing the word “plaintiff” to “parties” and the word “witness” to “witnesses,” and the pronouns referring to plaintiff from the singular to the plural.

None of the instructions given for plaintiff tell the jury that the plaintiff must prove his case by a preponderance of the evidence, but two of defendant's instructions do so direct the jury.

WING, CHADBOURNE & LEACH, attorneys for appellant.

Where the defendant undertakes to convey and deliver at a particular time and place, to be paid for on such delivery at a stipulated price, the plaintiff, to maintain his action, must aver and prove that he was ready to receive and pay for the property according to his undertaking. He must not be in default himself, but must show a readiness to perform on his part before he can compel the defendant to show performance, or respond in damages. *Dickhut v. Durrell*, 11 Ill. 72; 1 Chitty's Pl. 297; *Cook v. Ferrel*, 13 Wend. 285; *Dox et al. v. Dey*, 3 Wend. 356; *Porter v. Rose*, 12 John. 209; *Saunders' Pl. and Ev.*, 127, 128, and cases there cited.

See also *Hough v. Rawson*, 17 Ill. 591; *Hungate v. Rankin et al.*, 20 Ill. 639; *Funk v. Hough*, 29 Id. 145; *Kitzinger v. Sanborn et al.*, 70 Ill. 146.

A delivery to a common carrier is generally deemed a delivery to the consignee. 2 Kent, Comm., 492-496; *Wade v. Moffett*, 21 Ill. 110; *Owens v. Weedman*, 82 Ill. 409; *Benjamin on Sales*, Secs. 1, 181 and 315; *Brechwald v. People*, 21 Ill. App. 215.

The fact that goods are to be paid for in cash upon arrival does not prevent the title from passing. Where a buyer purchases or orders a specific quantity of goods to be shipped to him from a distant place, and the seller segregates and appropriates to the contract a specific quantity by delivering them to a vessel designated by the buyer, or, in the absence of such designation, to a common carrier, the mere fact that the contract contains a stipulation that they are to be paid for by note or in cash on arrival, does not prevent the title from passing, or make either payment or arrival a condition precedent thereto. In such case the goods become the property of the purchaser, and are at his

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risk from the time they are put on board the vessel. Farmer's Phosphate Co. v. Gill, 69 Md. 545; Mee v. McNider 109 N. Y. 500; Magruder v. Gage, 33 Md. 344; Appleman v. Michael, 43 Md. 281; Dutton v. Solomonson, 3 B. & P. 584; Fragano v. Long, 4 B. & C. 219; Alexander v. Gardner, 1 Bing. N. Cas. 671; Ill. Cent. R. R. Co. v. Cobb, Christy & Co., 64 Ill. 128; Cobb, Christy & Co. v. Ill. Cent. R. R. Co., 88 Ill. 394; Ill. Cent. R. R. Co. v. Miller, 32 Ill. App. 259.

The vital importance of a true interpretation by the trial court of this order as to the place of the delivery of the coal arises by reason of the legal rule as to the measure of damages. The rule is, that the difference between the contract price of the commodity contracted to be sold and the market value of that commodity at the time when and at the place where delivery should have been made under the contract furnishes the basis for the ascertainment of the damages. Smith v. Dunlap, 12 Ill. 184; Sangamon & Morgan R. R. Co. v. Henry, 14 Ill. 156; C. & R. I. R. R. Co. v. Ward, 16 Ill. 528; Phelps v. McGee, 18 Ill. 155; Sleuter v. Wallbaum, 45 Ill. 43; Larrabee v. Badger, 45 Ill. 440; Deere et al. v. Lewis et al., 51 Ill. 254; Long v. Conklin et al., 75 Ill. 32; Fletcher v. Patton, 21 Ill. App. 228; Capen et al. v. De Steiger Glass Co., 105 Ill. 186; Kitzinger v. Sanborn, 70 Ill. 146; Tribune Co. v. Bradshaw, 20 Ill. App. 17; Buckley v. Holmes, 19 Ill. App. 530; Brandamour v. Trant, 45 Ill. 372.

DANIEL W. POMEROY, *pro se*.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Appellant claims, first, that plaintiff did not make out his case by a preponderance of the evidence; second, that he failed to prove that he was able, ready and willing to receive and pay for the coal; third, that the court erred in the instruction for plaintiff as to the measure of damages; fourth, that the court erred in plaintiff's instructions by not requiring that plaintiff prove his case by a preponderance of the evidence; and fifth, that there was error in refusing appellant's seventh instruction as asked, and in giving it as modified.

The evidence was very conflicting, but from a careful examination of it, we can not say that the plaintiff failed to prove his case by the preponderance of the evidence. That was a question for the jury.

In order that plaintiff recover in this case, it was unnecessary for him to prove that he was able, ready and willing to receive and pay for the coal had it been shipped to him. The proof for appellant shows that it notified plaintiff, before the suit was commenced, that it could not fill plaintiff's order. That proof relieved plaintiff from the necessity of any proof in this regard. *Chicago House Wrecking Co. v. Rice Co.*, 67 Ill. App. 687; *Wolf v. Willits*, 35 Ill. 92.

The measure of damages laid down by the court in its instructions, was the difference between the contract price and the market price of the coal at the time and place when and where it should have been delivered under the contract. In this there was no error. The evidence showed the contract price and also the market price of the same coal at the time and place where it should have been delivered, and also, when all the evidence is considered, we think it clear that the contract was for delivery of the coal at Chicago, and not at the mines, as contended by appellant.

The general rule no doubt is, that delivery of goods to a common carrier by the seller, is a delivery to the buyer, the consignee. 1 *Beach's Mod. Law on Contrs.*, Sec. 563; 2 *Kent's Com.*, 494; 21 *Amer. & Eng. Ency. of Law*, 507; *Wade v. Moffett*, 21 Ill. 110; *Hatch v. Oil Co.*, 100 U. S. 134.

Appellant concedes that the instruction of the court was correct as a proposition of law, but contends that the evidence shows the place of delivery was to be at the coal mines.

In *Van Valkenburgh v. Gregg*, 45 Neb. 655, it was held that where a contract designates a place of delivery, the contract prevails, and if none is provided, then it may be inferred from the circumstances of the case.

In *Commercial Bank v. Ry. Co.*, 160 Ill. 406, the court say, in speaking of the duty of the common carrier and the effect of a time draft and bill of lading attached, "Under the authorities we think it is plain that the drawee, by accept-

ance of the draft, becomes entitled to the goods shipped, and to have the bill of lading surrendered or indorsed to him. The transfer of the bill of lading in such case operates to clothe the acceptor with evidence of title to the goods as the purchaser."

In *Lewis v. Springville Bkg. Co.*, 166 Ill. 316, it was held that where a bill of lading to the consignee was delivered by the shipper to a bank as security for money advanced on his drafts, that fact would operate as a delivery of the consignment itself.

We are therefore of opinion that whether the coal was contracted to be delivered at Chicago or at the mines, was a question of intention of the parties, and it seems clear from the contract and the evidence, that the intention was to deliver it at Chicago. They did not intend the title should pass until the bill of lading was delivered at Chicago to appellee, the draft paid and the coal had arrived.

The instructions for both parties must be considered together as a whole, and as the instructions of appellant tell the jury that the appellee must prove his case by a preponderance of the evidence, that avoids any claim of error in that regard in the appellee's instructions.

The court should have given appellant's seventh instruction as asked. *R. R. Co. v. Estep*, 162 Ill. 130; *R. R. Co. v. Nash*, 166 Ill. 528.

It can not be said, as in these cases, that the substance of the instruction was given in the instruction as modified by the court. That could be said if the parties to the cause were both natural persons, or if the modified instruction had been applied to the witnesses generally. The only possible application this instruction could have in this case, would be to appellee, unless to appellant's witness Coffey, who was not a party, nor, so far as the record shows, interested in the event of the suit. The modified instruction speaks of parties, their situation and interest in the result, and their testimony, and naturally, the jury would put the testimony of Coffey in these respects on the same basis as that of appellant. The instruction as modified was calculated to seriously

prejudice appellant. Moreover, when the evidence is very conflicting, as in this case, the instructions should be accurate. *Chicago City Ry. Co. v. Canevin*, 72 Ill. App. 83, and cases cited.

The judgment will be reversed and the cause remanded.

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Fort Dearborn National Bank of Chicago, and E. C. Wilson, Receiver of the First National Bank of Helena, v. Walter F. Wyman.

1. **BANKS AND BANKING—*Right to Appropriate Deposits of Failing Banks.***—A bank having on deposit the funds of a bank in failing circumstances and with which it has an open account for previous dealings, may lawfully appropriate such funds and credit such failing bank with the same, and drawers of checks upon such fund by the failing bank acquire no rights, either legal or equitable, which they can enforce to the prejudice of the bank appropriating and crediting such deposit.

2. **SAME—*Rights of Drawees of Checks by Failing Banks.***—The delivery of a check drawn by a failing bank of a sister State upon funds deposited to its credit in a resident bank of the State, does not give the drawee such an interest in the funds deposited as he can enforce in equity to the prejudice of the resident bank.

3. **MARSHALING ASSETS—*Rights of Paramount Creditors.***—A paramount incumbrancer is not to be delayed or inconvenienced in the collection of his debt, for it is unreasonable that he should suffer because some one else has taken imperfect security.

4. **SAME—*Application of the Doctrine.***—The rule marshaling assets will not be applied so as to delay the prior creditor or prevent him from realizing his whole debt, or where it would, for any reason, work injustice to such creditor.

5. **SAME—*Where the Doctrine Does Not Apply.***—The doctrine of marshaling assets does not apply to transactions where a resident bank holding collateral securities, and having also on deposit funds of a non-resident bank, before notice of its failure or of any adverse claims to such deposit, appropriates it to the payment of its own indebtedness against such non-resident bank, leaving in its possession only collateral securities.

6. **SAME—*The General Rule and Qualifications.***—As a general rule, before the doctrine of marshaling assets will be applied, there must be two funds or properties, on both of which one party has a claim or lien, and the other party has a claim or lien on one only of such funds or properties; it does not follow necessarily that the fund on which both

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the claims originally rested, must be in existence at the moment of time when the aid of the doctrine is invoked.

7. **CHECKS—Equitable Assignment as between Drawer and Payee.**—In Illinois, as between the drawer and payee, a bank check given, for value, upon a fund in bank, operates as an equitable assignment to the payee of the sum of money named in the check, and transfers to the payee the right of the depositor to the money on deposit to the amount of the check, if that amount is then in bank.

8. **EQUITY—Substance, Not Form.**—It is a principle of very extensive application that equity looks to substance, not form, and it may be termed a maxim of equity.

9. **SAME—General Doctrine of.**—Equity regards that as done which should be done and will require that to be done which ought to have been done, when no third person is injured or embarrassed.

In Equity.—Bill of discovery. Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Hearing and decree for complainant. Error by defendants. Heard in this court at the October term, 1898. Reversed, with directions.

STATEMENT.

The defendant in error, Wyman, on September 1, 1896, for value, received from the First National Bank of Helena, Montana, its check for \$10,000, payable to his order, and directed to plaintiff in error, the Fort Dearborn National Bank of Chicago. September 5, 1896, Wyman presented the check to the latter bank and demanded payment thereof, which was refused, and again, on September 8, 1896, he presented it for payment and was refused.

September 1, 1896, when Wyman received the check, and up to September 4, 1896, the Fort Dearborn Bank had on deposit and due to the First National Bank of Helena, \$20,523.67. The former bank also had in its possession, during the same time, certain promissory notes made by divers persons, not then due, aggregating more than \$29,000, payable to the order of the latter bank, which had been delivered to the former by the latter bank as collateral security for the amount due on a certificate of deposit of \$25,000, payable on demand, issued by said First National Bank May 15, 1895, and held by the Fort Dearborn Bank. The former was also indebted to the latter bank on book account, during this same period, \$649.89.

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September 4, 1896, said First National Bank became insolvent. The comptroller of the currency appointed a receiver, who at once entered upon his duties and took charge of its assets, and his successor, E. C. Wilson, also appointed by the said comptroller, is now acting as such receiver.

The Fort Dearborn Bank, on September 4, 1896, and before it had any knowledge or notice of the issuance and delivery of the check to Wyman, applied said deposit of \$20,523.67, in part payment of the amount due to it on said certificate of deposit for \$25,000, and immediately made an entry on its books, crediting said First National Bank with that amount, and thereby completely exhausted said deposit, so that when the check was presented on the following day there was no fund remaining with it subject to the payment of the check. There still remains due to the Fort Dearborn Bank \$2,321.39 and some interest thereon, to secure which it holds all said notes.

Wyman filed a bill January 21, 1897, asking for a discovery of some of the facts stated, that the Fort Dearborn Bank be required to make a diligent and prudent disposition of its collateral securities, and from the proceeds to satisfy its lawful claims against the First National Bank, so far as they will avail, and out of the deposit to pay said check, and for general relief.

The cause was tried upon bill and answer and the chancellor decreed that the Fort Dearborn Bank deliver to said Wilson, as receiver of the First National Bank of Helena, said collateral notes; that the receiver proceed to collect the same, and from the proceeds to pay to the Fort Dearborn Bank the amount, including interest due it, then to Wyman the amount due on said check and interest, and to retain the balance as part of the assets of said First National Bank. The decree also provided that if there was not enough to pay Wyman in full, the amount unpaid should be allowed as a claim against said First National Bank, to be paid in due course of administration of its assets, and that Wilson, as receiver, pay the costs of this suit. To reverse this decree this writ of error was sued out.

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GILBERT & FELL, attorneys for plaintiffs in error.

It is an elementary rule of the doctrine of marshaling securities that in order to authorize marshaling, the party seeking the relief must have an existing charge against, or interest in a fund which is subject in common with another fund to a paramount liability. Vol. 1, Story's Equity Jurisprudence, Sec. 633.

It is well settled in this State that as between the payee or holder of a check or draft and the drawee bank, no rights accrue in favor of the payee or holder until the check or draft is presented to the bank and payment thereof is demanded. *Greenebaum v. American Trust & Savings Bank*, 70 Ill. App. 407; *Northern Trust Company v. Rogers*, 60 Minn. 208; *Gage Hotel Co. v. Union National Bank*, 171 Ill. 531; *Pabst Brewing Co. v. Reeves*, 42 Ill. App. 154; *Munn v. Burch*, 25 Ill. 35; *Fourth Nat'l Bk. of Chicago v. City Nat'l Bank*, 68 Ill. 398; *Myers v. Union Nat'l Bank*, 27 Ill. App. 254; *Niblack v. Park Nat'l Bank*, 169 Ill. 517; *Laclede Bank v. Schuler*, 120 U. S. 511; *Metropolitan Bank of Chicago v. Jones*, 137 Ill. 634; *Daniel on Neg. Insts.*, Secs. 1638, 1643 and 1644 (4th Ed.); *Morse on Banks and Banking* (3d Ed.), Sec. 505.

Where a bank holds a demand note, or a note past due, it has the right to charge such obligation up against the maker's deposit account, and if it does so before a check drawn by the depositor is presented for payment it will be entitled to hold the deposit against any check afterward presented. *Niblack v. Park Nat'l Bank*, 169 Ill. 517; *Myers v. Union Nat'l Bank*, 27 Ill. App. 254; *First Nat'l Bank v. Kelsay*, 54 Ill. App. 660.

The certificate of deposit involved in this case is in effect a demand promissory note. *Hunt v. Divine*, 37 Ill. 137; *Tripp v. Curtenius*, 36 Mich. 494.

The defendant in error must concede that the certificate of deposit was due and payable on September 4, 1896. If it were not then due and payable the Fort Dearborn National Bank would not have had the legal right to credit the money in its possession on that date belonging to the First

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National Bank of Helena, in part payment of its claim on said certificate of deposit. And it would have had in its possession, at the time when the draft was presented by the defendant in error, on the 5th day of September, 1896, a sufficient amount on deposit to the credit of the said First National Bank of Helena, the drawer, with which to pay it. If this were so, it is self-evident that the defendant in error would have a plain, adequate and complete remedy at law, and he would be compelled to resort to a court of law and not to a court of equity to recover the amount of his draft from the Fort Dearborn National Bank, had it refused to pay it when presented. So that when the defendant in error comes into a court of equity and asks relief of the character which he has prayed for in his bill, he must admit that the indebtedness of the said First National Bank of Helena, evidenced by the said certificate of deposit, was due and owing to the Fort Dearborn National Bank on September 4, 1896, or his case will be open to the objection that he should have applied to a court of law and not to a court of equity for relief. Further than this the record shows that the certificate of deposit was, in fact, due and payable on September 4, 1896. This fact is expressly alleged in the answer to the bill of the defendant in error and must be taken as true. The law is, that an answer to a bill in equity is to be taken as true where a cause is heard on a bill and answer. Section 29, Chapter 22, Vol. 1, Starr & Curtis' Annotated Statute of Illinois.

PECKHAM & BROWN, attorneys for defendant in error, contend that the bill is drawn and our decree in the Superior Court framed on the familiar principle of the marshaling of assets, securities or funds, so that a person having a claim on one fund only, may have the benefit of that fund so far as it may be consistent with the rights of another person holding over such fund, and also over a second one, a paramount liability.

They claim no rights against the Fort Dearborn National Bank which injure it or operate to its disadvantage. The

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real contention is between the defendant in error and the general creditors of the First National Bank of Helena, represented by its receiver.

As against such receiver and such creditors they claim to have a clear equitable right that the funds and securities in the hands of the Fort Dearborn National Bank shall be marshaled so that their rights shall be preserved, not sacrificed.

To render them entitled to such marshaling, it is only necessary that there should be an "interest in" or "claim on" the funds in the hands of the Fort Dearborn National Bank given by the drawing of the check involved and its delivery for value to defendant in error.

That such "interest in" and "claim on" such fund was given by such drawing and delivery—that such drawing and deliver was an assignment and transfer indeed of the fund *pro tanto*—is the doctrine of the Supreme Court of Illinois. *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483; *Abt v. American Trust & Savings Bank*, 159 Ill. 467; *Bank of Antigo v. Union Trust Co.*, 149 Ill. 343; *Gage Hotel Co. v. The Union National Bank*, 171 Ill. 531.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Plaintiffs in error claim there was error in giving Wyman the relief awarded by the decree, and that the court should have dismissed his bill for want of equity.

The Fort Dearborn Bank having appropriated the fund on deposit with it due to the Helena Bank, by crediting on its books the amount of such fund to the latter bank, before notice of the issuance and delivery to Wyman of the check by the Helena Bank, Wyman acquired no rights, either legal or equitable, which he can enforce to the prejudice of the Fort Dearborn Bank. *Niblack v. Park Nat. Bank*, 169 Ill. 517; *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531; *Laclede Bank v. Schuler*, 120 U. S. 511.

This is conceded by counsel for defendant in error in his

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brief, and that would appear to have been the theory of his bill, though the decree goes further and requires the securities to be delivered to the Montana receiver by the Fort Dearborn Bank.

It is contended by counsel for Wyman that by the delivery of the check to him for value on September 1, 1896, he acquired an "interest in" the fund of \$20,523.67, deposited with the Fort Dearborn Bank to the credit of the Helena Bank, which, upon the well recognized equitable principle of marshaling assets or securities, entitles him to relief in equity, and that the decree entered does not abridge the rights of the former as against the latter bank.

We can not assent to that part of the contention that the rights of the Fort Dearborn Bank are not abridged by the decree, and the majority of the court (not including the writer) are of opinion that the proposition as a whole is untenable. In 3 Pomeroy's Eq. Juris., Sec. 1414, after stating the rule as to marshaling securities, the author gives the following, among other, exceptions: "The paramount incumbrancer shall not be delayed or inconvenienced in the collection of his debt, for it would be unreasonable that he should suffer because some one else has taken imperfect security; and the rights of third parties shall not be prejudiced."

Mr. Beach, in Modern Eq. Juris., after stating the rule as to marshaling, says, Sec. 782: "It will not be applied so as to delay the prior creditor or prevent him from realizing his whole debt, or where it would, for any reason, work injustice to such creditor."

Both authors cite numerous authorities which fully sustain them.

The Fort Dearborn Bank, therefore, clearly had the right as against Wyman to retain its securities until its debt was paid, and it should not have been required to deliver them to a foreign receiver to take beyond the jurisdiction of the Superior Court, even for purposes of collection, there being no claim that the Fort Dearborn Bank was of doubtful solvency, or that Wyman's rights would be in any way endangered by its retaining and collecting the collaterals.

The majority of the court is further of opinion that the principle of marshaling assets is not applicable in this case for the reason that before notice of the claim of Wyman, and before the bill was filed, the Fort Dearborn Bank, as it had a perfect right to do, appropriated the fund on deposit with it to the credit of the Helena Bank, thus leaving in its possession only one fund, to wit, the collateral securities on which Wyman had not and has not claimed any lien. This conclusion is based upon the theory that in order to give a court of equity jurisdiction to marshal assets, there must be at least two funds in existence when the bill is filed, on both of which one of the parties has a claim or lien, and the other party has a claim or lien on one only of the funds, or that the party having the claim or lien on both the funds wrongfully appropriated the fund on which alone the other party had a claim or lien. Generally the cases in which the doctrine of marshaling assets is discussed in the books, are cases where there are in existence, at the time the jurisdiction of equity is invoked, two or more funds or properties in which the parties claim an interest as stated. The text writers, in discussing the same subject, seem to contemplate the existence of two or more funds so situated in order that the doctrine may be invoked.

In *Turner v. Flinn*, 67 Ala. 531, it was held that where a senior mortgagee of two properties had so far foreclosed his mortgage as to sell all of the property which was also included in a junior mortgage, and had applied the proceeds before the junior mortgagee filed his bill asking a marshaling of the securities, there was nothing left on which the doctrine of marshaling could operate; that no two funds were left to be marshaled; that there was no fund on which each mortgagee had a lien, and therefore that no relief could be granted the junior mortgagee. The court also held that had the junior mortgagee filed his bill before the sale and application of the proceeds by the senior mortgagee, he would have been entitled to relief. This is the only case directly deciding the question, which has come to our notice, and the majority of the court are of opinion

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that Wyman is not entitled to any relief, and that the decree should be and is reversed, with directions to dismiss the bill for want of equity, at the cost of defendant in error.

While the writer agrees that the decree should be reversed, because it deprives the Fort Dearborn Bank of the right to realize on its securities, he can not assent to the proposition that there is no equity in the bill, and what is now presented is the personal view of the writer. While it is true that, as a general rule, before the doctrine of marshaling assets will be applied there must be two funds or properties, on both of which one party has a claim or lien, and the other party has a claim or lien on one only of such funds or properties, I think that it does not follow necessarily, that the fund on which both the claims or liens originally rested, must, in a strict sense, be in existence at the moment of time when the aid of equity is invoked.

It is well established in Illinois that, as between the drawer and payee of a bank check given for value upon a fund in bank, the check operates as an equitable assignment to the payee of the sum of money named in the check. It transfers to the payee the right of the depositor to the money on deposit to the amount of the check, if that amount is then in bank. *Bickford v. First Nat. Bank*, 42 Ill. 240; *Ridgely Nat. Bank v. Patton*, 109 Ill. 479; *Nat. Bank of Amer. v. Ind. Bkg. Co.*, 114 Ill. 483; *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531; 1 *Beach's Mod. Eq. Juris.*, Secs. 333 to 335.

It would follow that when Wyman received the check, the Helena Bank had no equitable interest remaining in the fund on deposit with the Fort Dearborn Bank, except in the balance of the fund after deducting the amount of the check, and Wyman had an equitable interest in that fund to the extent of his check. The Fort Dearborn Bank was not bound to Wyman until he presented the check for payment, or at least until it had notice of the check. The Helena Bank might have subsequently given another check, which, if presented before Wyman's check, would have cut him off, but that question does not arise.

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There is no question under the law, that had the aid of equity been invoked at any time before the Fort Dearborn Bank had credited the Helena Bank with the amount of the deposit, the former bank, under the doctrine of marshaling assets, would have been required to first exhaust the collateral notes held by it before appropriating the deposit fund, unless it could be said that would have had the effect of delaying or working an injustice to the Fort Dearborn Bank, in which event Wyman, on paying the bank's claim, would have been subrogated to its lien on the collateral notes. 2 Beach's Mod. Eq. Juris., Sec. 784; 1 Story's Eq. Juris., Secs. 635 and 636.

Must equity deny Wyman relief because the Fort Dearborn Bank entered on its books a credit to the Helena Bank the day before the check was presented, when that is the only change in the situation of the parties, when the Fort Dearborn Bank has the money which it would have been bound to pay on the check when presented but for the bookkeeping entries, when the interest of no third party has intervened, and only the general creditors of the Helena Bank, represented by its receiver, can be interested as against him, and when all injustice or loss to the Fort Dearborn Bank can be avoided? I think not.

A principle of equity of very extensive application is, that equity looks to substance and not form. 1 Beach's Mod. Eq. Juris., Sec. 7.

Mr. Pomeroy, in his excellent work on Equity Jurisprudence, Sec. 363, classes this principle with others, and says that it is so fundamental and essential that it may be termed a maxim of equity.

I see no good reason why this principle may not be applied to this case and be made a basis for relief. The substance of the situation is not changed by the entry on the bank's books.

Another most salutary principle of equity, and the basis for many forms of equitable relief, is that equity regards that as done which ought to be done (1 Beach's Mod. Eq. Juris., Sec. 8); or, as Mr. Story (Eq. Juris. Sec. 64 g) states it,

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“Equity looks upon that as done which ought to have been done. The true meaning of this maxim is, that equity will treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been; not as the parties might have executed them.”

Mr. Beach, in commenting on this principle, Sec. 8, *supra*, says that it is of extensive application, but that “the thing which is looked upon as done is that which ought to be done, not that which might have been done.”

To the same effect is 1 Pomeroy’s Eq. Juris., Secs. 354 to 368.

The text writers cite numerous cases, of the greatest diversity of facts, in which this principle has been applied; notably cases where land has been by will directed, or by the acts of the parties intended to be turned into money, or *vice versa*, in cases of executory contracts for the purchase and sale of land, and generally in every kind of case where an affirmative equitable duty to do some positive act devolves upon one party, and a corresponding equitable right is held by another party.

Owing to the press of official duty, I have not been able to make an exhaustive search of the precedents, and have not found a case where this principle has been applied to facts similar to the case at bar, but that is not a good reason for failing to apply an equitable principle where the facts of the particular case warrant it.

The following cases are in some respects analogous in principle to the case at bar. I refer to them as illustrating the one or the other of the two equitable principles above stated, and as applications of the doctrine of marshaling assets when the creditor, having two funds, had released that on which the other claimed a lien, and of subrogation as related to the marshaling of assets. *Ingalls v. Morgan*, 10 N. Y. 178-185; *McNeil v. Miller*, 2 S. E. Rep. (W. Va.) 335; *Campbell v. Carter*, 14 Ill. 286-9; *Young v. Morgan*, 89 Ill. 200.

The only reason which occurs to me why it may not be

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said that the Fort Dearborn Bank would not, under the facts of this case, in equity be required to do now what it would have been required to do had the check been presented before the bank entered on its books the credit, is that the bank had no notice of Wyman's claim. I think, however, that is of no importance when it is considered that the bank would not suffer, and no third person would suffer because of the lack of notice. The final acts contemplated by the Helena Bank (represented here by its receiver), by Wyman and the Fort Dearborn Bank, when the check was given, were its presentation and payment out of the fund on deposit with the latter bank. I say that was in contemplation by the Fort Dearborn Bank then, because it must be held to have contemplated doing that which was its duty, that is, to pay the Helena Bank's checks on presentation. It contemplated doing that whenever requested. It is not enough in a court of equity that the Helena Bank or the Fort Dearborn Bank might have done otherwise. It is enough that the Helena Bank gave no other check which was presented so as to defeat Wyman's equity, and that the Fort Dearborn Bank may be fully protected.

It was held in *Campbell v. Carter, supra*, that where a party purchased an estate which was subject to an incumbrance to him, a court of equity would consider it as subsisting or extinguished, as might be most conducive to his interests, unless it appeared that it was his intention, in taking a conveyance of the estate to himself, to rely on that title and discharge the incumbrance. In this line of cases the principle is well established that equity will require that to be done which ought to have been done, when no third person is injured or embarrassed. It would seem just, that as no one concerned will be injured or embarrassed, the lien of Wyman may be held as subsisting for the purpose of requiring the collaterals held by the Fort Dearborn Bank to be disposed of by it, and after its claim is satisfied, then to pay Wyman.

The writer is of opinion the cause should be remanded, with directions to the Fort Dearborn Bank to dispose of

the securities, and after it shall have been paid its claim, costs and expenses, that Wyman be paid his claim, costs and expenses, and the balance, if any, to the receiver. These views not being in accord with the majority of the court, the decree is reversed, with directions, as stated in the majority opinion. Reversed with directions.

**People of the State of Illinois v. John York Company,
a corporation.**

1. **APPEALS—***By the People in Criminal Cases.*—An acquittal in a prosecution for violating section 16 of the Pharmacy act, is an acquittal in a criminal case, and no appeal lies by the people.

Prosecution under the Pharmacy Act.—Trial in the Circuit Court of Cook County, on appeal from a justice of the peace; the Hon. JOHN GIBBONS, Judge, presiding. Verdict of acquittal. Appeal by the people. Heard in this court at the October term, 1898. Appeal dismissed. Opinion filed February 9, 1899.

KITT GOULD, attorney for appellants; GABRIEL J. NORDEN, of counsel.

KERR & BARR, attorneys for appellee.

A writ of error does not lie at the instance of the people to reverse the judgment of a trial court in a criminal case. *The People v. Glodo*, 12 Ill. App. 348; *The People v. Dill*, 1 Scam. 257.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellee was convicted before a justice of the peace for a violation of section 16 of the Pharmacy act, Rev. Stat., p. 1078, par. 33, and appealed to the Circuit Court, where a trial was had and appellee was acquitted, and appellants appealed to this court. Appellee moved here to dismiss the appeal on the ground that no appeal lies by the people in

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such case as the present, and the motion was reserved till the hearing.

A violation of section 16 of the Pharmacy act is a misdemeanor, and is by the section expressly declared so to be. It is provided in the criminal code that "in no criminal case shall the people be allowed an appeal, writ of error or new trial." Rev. Stat., p. 617, par. 437; see also, *People v. Miner*, 144 Ill. 308; *Same v. Glodo*, 12 Ill. App. 348, and *Same v. Dill*, 1 Scam. 257.

The appeal is dismissed.

City of Chicago v. William J. English.

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1. MUNICIPAL INDEBTEDNESS—*Certificate of Comptroller Not Competent Evidence of.*—The certificate of the comptroller of the city of Chicago is not competent evidence of the bonded indebtedness of the city.

2. EVIDENCE—*Of Municipal Matters.*—The papers, entries, records and ordinances or parts thereof, of any city, may be proved by a copy thereof certified under the hand of the clerk or the keeper thereof, and the corporate seal, if there be any; if not, under his hand and private seal; and such papers, entries, records and ordinances may be proved by copies examined and sworn to by credible witnesses.

3. MUNICIPAL CORPORATIONS—*Execution of Leases by.*—The statute (Rev. Stat., Ch. 24, Sec. 14) makes the mayor the chief executive officer of the city and he is the proper officer to execute a lease, having the corporate seal of the city properly affixed by the city clerk.

4. INTEREST—*Municipal Corporations Not Liable for in the Absence of a Contract.*—A city is not liable for interest in the absence of a contract to pay interest.

Covenant, on a lease. Trial in the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Finding and judgment for plaintiff. Appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed February 9, 1899.

STATEMENT.

Appellee brought an action against appellant for breach of the covenants of a lease of certain premises in Chicago (describing same) to be used as a water office by appellant

for one year from July 15, 1892, to July 15, 1893, at a yearly rent of \$1,000, payable monthly, and providing that unless appellant did, by notice in writing to appellee by April 1, 1893, elect not to extend the lease for one year on the same terms, it should be so extended, and similarly from year to year, and also providing that appellant should pay all water rates or rebate the same. The lease purports to be from appellee to the city of Chicago, and is signed by appellee and by the mayor and comptroller of the city of Chicago, and has affixed thereto the corporate seal of said city.

The first count of the declaration sets up that the lease was extended pursuant to its terms, and breaches of the covenants of the lease in payment of rent; the second count, a breach in failure to pay or rebate \$95.72 water rates which appellee paid. The third count sets up a claim for interest on amounts due by reason of breaches of the covenants alleged in the first and second counts. The fourth count is in substance the same as the first, and the fifth for use and occupation of said premises by appellant as an office for the water works of the city, etc., under an indenture executed by appellee to appellant. Appellant pleaded, denying the execution of the leases set out in the different counts, which plea was sworn to, and also that the city council had made no appropriation of moneys to pay the several sums covenanted to be paid by it, or any of them, and that at and previous to the time of making the said covenants, etc., appellant was indebted in the aggregate exceeding five per cent on the value of its taxable property, etc.

A trial was had before the court, without a jury, which resulted in a finding and judgment for appellee of \$2,432, from which this appeal is taken.

It appears from the evidence that the seal of the city of Chicago was affixed to said lease by the city clerk; that the premises were used by the city as a water office for the collection of water rents under the water system of Chicago from July 15, 1892, to the time of trial; that it was

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known as the water office in the town of Lake, and is so described in the annual appropriation bills of the city; that no appropriation was made to appellee individually, but an appropriation was made for rent of the town of Lake water office sufficient to cover the amount of rent due each year under said lease during the whole of the period of the lease up to the time of trial, and there was a surplus in the water fund of the city of Chicago from January 1, 1892, to 1898, of at least \$48,000, at all times.

Appellant paid rent to appellee for the demised premises by vouchers to appellee, payable out of its surplus water fund, up to May 1, 1895, but it gave no notice at any time that said lease should not be extended. By reason of appellant shutting off the water on said premises, appellee was compelled to and did pay, under protest, for water rents thereon, \$95.72, November 9, 1896. No payment of rent was made after May 1, 1895.

Appellant proved the assessed valuation of property in Chicago for the years 1891-'97, both inclusive, and offered to prove the bonded indebtedness of the city on January 1, 1892, and on June 4, 1894, this being the date of the lease from appellee, by a certificate of the comptroller of the city, but the court rejected the offered certificate, and appellant excepted. The certificate which was offered and appears in the record, purports to show the bonded indebtedness of the city on the 1st day of January of each of the years 1891-'98, inclusive, and also on June 4, 1892, and July 9 and 12, 1894, but no other evidence was offered as to the bonded indebtedness of the city.

CHARLES S. THORNTON, corporation counsel, and THOMAS J. SUTHERLAND, attorneys for appellant.

W. S. HEFFERAN, attorney for appellee.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Appellee made a motion to dismiss this appeal for want

of jurisdiction, claiming that there was involved in the appeal a construction of section 12, article 9, of the Constitution of this State. The decision of the motion was reserved to the final hearing, but must be denied. The ground of appellee's motion is, that as appellant pleaded that it was indebted in the aggregate exceeding five per cent on the value of taxable property in the city, as ascertained by the last assessment for State and county taxes previous to the making of the lease which is the basis of the suit, the issue presented requires a construction of the Constitution. However that may be, there is no evidence in the record which tends to prove the issue presented by the plea, and therefore the question is not in the case.

The certificate of the comptroller of the city of Chicago was not competent evidence of the bonded indebtedness of the city, and was therefore properly excluded by the court. Sec. 14, Ch. 51, Rev. Stat., provides, viz.: "The papers, entries, records and ordinances, or parts thereof, of any city, village, town or county, may be proved by a copy thereof certified under the hand of the clerk or the keeper thereof, and the corporate seal, if there be any; if not, under his hand and private seal;" and Sec. 18 provides that "any such papers, entries, records and ordinances may be proved by copies examined and sworn to by credible witnesses."

A compliance with one or the other of these sections of the statute, or a production of the record itself, unless destroyed, was necessary in order to prove what was shown by the city records. If the comptroller attempts to certify as to the records, his certificate must be of a copy of the records, or it is not competent evidence. *East St. Louis v. Freels*, 17 Ill. App. 341; *Schott v. People*, 89 Ill. 198; *Mandel v. Swan Land Co.*, 154 Ill. 189.

In so far as the holding in *E. St. L., etc., Co., v. E. St. Louis*, 45 Ill. App. 601, may conflict with our conclusion above stated, we must decline to follow it, as we are clearly of opinion that the certificate here in question is of a conclusion, and not of a copy of the records of the city.

The contention of appellant that the lease was not proven

is not tenable. The statute (Rev. Stat., Ch. 24, Sec. 14,) makes the mayor the chief executive officer of the city. He is the proper officer to execute the lease, and it, having the corporate seal of the city attached, which, as was testified to, was affixed by the city clerk, was properly admitted in evidence. 1 Dillon on Mun. Corporations, Secs. 208 and 452; Kinzie v. Chicago, 2 Scam. 188; Mott v. Danville Semy., 129 Ill. 412; Smith v. Smith, 62 Ill. 496; Mitchell v. Deeds, 49 Ill. 424.

The evidence is sufficient that an appropriation was made and therefore that contention can not avail appellant.

There seems to have been included in the finding and judgment of the court, \$2.95 for interest. This was error, as the city is not liable for interest in the absence of a contract to pay interest. City of Pekin v. Reynolds, 31 Ill. 530; Vider v. City of Chicago, 164 Ill. 357.

If appellee will remit \$2.95 from his judgment within ten days, it will be affirmed for \$2,429.05, appellant not to recover costs; otherwise it will be reversed and the cause remanded.

Affirmed on remittitur.

Jacob B. Auerbach v. F. Arguelles, C. Lopez and J. Lopez, Copartners, etc.

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98	163
80	167
98	1640

1. **VARIANCE**—*In the Names of Jurors Appearing in the Record and Those in the Verdict.*—Where the names of the jurors, as signed to the written verdict, vary in some slight particulars from the names as shown in the record, but a comparison shows that the variance is so slight that they would be held identical under the rule of *idem sonans*, and the record recites that “the jury impaneled herein finds the issues,” etc., without reciting their names, it is sufficient.

Attachment.—Trial in the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Verdict and judgment for defendant. Error. Heard in this court at the October term, 1898. Affirmed. Opinion filed February 9, 1899.

Defendants in error began this suit against plaintiff in error by attachment. Several grounds for attachment were set forth in the affidavit. One was that plaintiff in error had "within two years last past fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder and delay his creditors."

There is no controversy as to the claim of defendants in error as to amount due. The only issue contested was that of ground for attachment.

It appeared in evidence that on June 12, 1896, and before the beginning of the suit, an interview took place between plaintiff in error and the attorney of defendants in error, in which the financial situation of plaintiff in error was fully discussed, in relation to the claim due defendants in error and in relation to the securing of same. Messrs. Hawley and Wodiska, together with Auerbach, plaintiff in error, went into a detailed investigation of his, Auerbach's, financial condition. A written statement of Auerbach's indebtedness to others was produced. It had been previously made, but Auerbach then stated that it showed all his indebtedness except items amounting to not to exceed \$1,000. No indebtedness to Ida Blumlein was shown by this statement. Hawley and Wodiska testify that Auerbach then stated that he owed no individual debts. It was thereupon agreed that if the brother of Auerbach would secure one-half of the claim of defendants in error, further time would be given Auerbach in which to pay. An appointment was arranged by them all to meet that afternoon at 2:30 P. M., to go to Milwaukee to see the brother and accomplish such adjustment. The parties separated at about 12:45 P. M., and within a few minutes thereafter, and before the time appointed for another meeting, the store of Auerbach was closed upon foreclosure of a chattel mortgage, dated that day, and conveying his entire stock of goods to secure a note of \$2,000 to one Ida Blumlein. The stock was afterward sold upon the foreclosure, bought by one Foster, and afterward returned to the possession of Auerbach or the "J. C. Auerbach Company." The issues tried here are solely between defendants in error and Auerbach. Neither

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Foster nor the J. C. Auerbach Company appears as making claim to the property. Auerbach, called as a witness in his own behalf, in effect admitted the exhibiting of the written statement, but stated, in reply to a question as to whether it was correct, that he had said, "As far as I know there may be some other accounts which have changed, and so forth." He denied that he was asked as to any "private confidential debts." Upon cross-examination he stated that he had told Hawley that the written statement in his own handwriting was a correct "statement of my liabilities," with the exception of one Ellinger account, which he had paid, and that there were some slight changes in amounts shown by the statement. He also testified that Mrs. Ida Blumlein then "held a note made by me for \$2,000," and that he did not inform Hawley as to the same.

Neither Mrs. Blumlein nor Auerbach, though both in court, testified to any indebtedness in consideration of which the note was given.

The jury found the issues in assumpsit and in attachment for defendants in error.

ISRAEL COWEN, attorney for plaintiff in error, contended that the names as shown to be sworn appear in the first column, and as signed to the verdict in the second column, thus:

Soren Jepsen,
E. C. Leidy,
Clemins A. Gies,
Hans Yensen,
Geo. D. Lerow,

Soren Jepson,
E. C. Leedy,
Clemons Gies,
Hans Jansen,
Geo. L. Lerow,

and insisted that whatever might be said of the rest of the names, and giving the utmost latitude to the doctrine of *idem sonans*, it can not be claimed that the names Leidy and Leedy or Yensen and Jansen are the same.

HAWLEY & PROUTY, attorneys for defendants in error.

MR. JUSTICE SEARS delivered the opinion of the court.

It is difficult to see how the jury could have reached any

different verdict. There is a color of fraud in the transaction. The jury must have found from the evidence that Auerbach admitted that the Blumlein note was not evidence of a *bona fide* indebtedness. To have found otherwise upon the equivocal testimony of Auerbach would have been to find against the manifest weight of the evidence. Auerbach alone appears in this cause as claiming under the Blumlein note. No one claiming title through the sale, upon foreclosure of the mortgage securing that note, intervenes. Auerbach admitted, in effect, that the note was given to one to whom he owed nothing. As against this admission no evidence is proffered, although Mrs. Blumlein was in court.

The jury were fully warranted in finding that the Blumlein note and mortgage were fraudulently given by Auerbach. They bore date on the 12th day of June, the same day of the conversation and agreement with Hawley and Wodiska, and were in process of foreclosure within so short a time after such conversation as to warrant the jury in finding that they had been previously executed on that day. We are of opinion that the verdict is sustained by much the greater weight of the evidence.

Some objections are made to matters of procedure.

The names of the jurors, as signed to the written verdict, vary in some slight particulars from the names as shown in the record. A comparison shows that the variance is so slight that they would be held identical under the rule of *idem sonans*. But the record recites that the "jury impaneled herein finds the issues," etc., without reciting their names. This is sufficient. *Griffin v. Larned*, 111 Ill. 432; *Lambert v. Borden*, 10 Ill. App. 648; *Wells v. Ipperson*, 48 Ill. App. 580; *Jemison v. Chicago Const. Co.*, 64 Ill. App. 436; *Egmann v. E. St. L. C. Ry. Co.*, 65 Ill. App. 348; *People's C. A. Co. v. Darrow*, 70 Ill. App. 22.

Counsel for plaintiff in error refers in his brief to the twelfth, fourteenth and sixteenth instructions refused, merely saying that he calls attention to them, but specifying no fault or objection. We must decline to search for objections when none are made.

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The eighth instruction given for the defendants in error is objected to as improper. There is some controversy as to the precise form in which it was given by the court below to the jury. However, plaintiff's counsel, in reply brief, ask us to pass upon it, as containing the disputed portion, as follows:

"The court instructs the jury in reference to the production of witnesses who know about the facts in issue, that if you believe from the facts and circumstances in evidence that there is other evidence to rebut the evidence of the plaintiffs, which might be furnished by any witness other than the defendant and the other witnesses whom he has produced and examined upon this trial, and that such other witness is in the control of the defendant and could be procured by him, and if you believe from the evidence that the evidence against the defendant, if there is any, is such that he would naturally be expected to call such other witness, his failure so to do would be a circumstance which might be considered by the jury, and given such weight and significance as they think it entitled to, and from which they might infer, if they think the inference warranted and a reasonable one, from the evidence, that such other witness would testify unfavorably to the defendant, if called by him."

We think the instruction was properly given. *Ill. Mut. Fire Ins. Co. v. Malloy*, 50 Ill. 419; *Consol. Coal Co. v. Scheiber*, 167 Ill. 539; *P., Ft. W. & C. Ry. Co. v. Callaghan*, 50 Ill. App. 676; *Commonwealth v. McCabe*, 163 Mass. 98.

If the words in dispute, viz., "is in the control of the defendant," were omitted, a different question would arise as to its correctness. But if we should assume that the instruction was given with the qualifying words omitted, and that it was therefore technically incorrect, yet we would hold it not to be reversible error. It could not be applied by the jury to any witness other than Blumlein, and therefore could not have prejudiced plaintiff in error. And when it is so apparent that substantial justice has been done, we would decline to reverse because of such an error in proced-

ure. The same may be said of any question as to the remarks of counsel upon the failure to present evidence upon the trial, to which objection is now urged. The return of one verdict finding upon both issues, *i. e.*, the issue in assumpsit and that in attachment, was proper. *Hawkins v. Albright*, 70 Ill. 87.

The judgment is affirmed.

Jacob A. Henry v. LeRoy G. Seager et al.

1. **PARTIES**—*Right to Rely upon the Announcements of the Court.*—A party or his attorney has a right to rely upon the oral announcement of the judge as to what judgment is rendered in the case, and is not required to see that the clerk enters the order directed to be entered by the judge.

2. **JUDGMENTS**—*Motion to Set Aside, When Too Late—Equitable Relief.*—It is too late to move the court to set aside a judgment after the term is ended; the remedy then, if any, is by bill in equity.

3. **ATTORNEYS**—*Effect of Their Negligence upon Clients.*—The negligence of the attorney is the negligence of his client. The client is bound thereby, and must look to his attorney if he suffers from his negligence.

4. **CHANCERY PRACTICE**—*Decrees Pro Confesso.*—Where a defendant is given an opportunity to answer the bill, and allows a decree *pro confesso* to be taken against him, he admits the truth of all the allegations of the bill, well pleaded, and renders it unnecessary for the chancellor to hear evidence upon such matters.

Bill to Set Aside a Judgment.—Trial in the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Decree *pro confesso*. Appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed February 9, 1899.

STATEMENT OF CASE.

February 15, 1898, appellees filed their bill in the Superior Court of Cook County to set aside a judgment at law, obtained by appellant against them for \$2,250, on January 31, 1898, in the same court. The allegations of the bill show that appellees had a good defense to the suit at law,

Henry v. Seager.

and that the judgment obtained against them by appellant was grossly unjust; that appellees had employed counsel to make their defense, who was instructed to represent them, take full charge of their defense, and watch the trial calls and keep them advised of the progress of the cause; that they had made preparations for their defense (setting forth the details of such preparation), and were fully ready and prepared for trial and to defend said cause upon the merits, in October, 1897; that on October 28, 1897, the said attorney was present at a first call of cases for trial in said court, and asked, when the suit of appellant against appellees was reached and called, that it be dismissed for want of prosecution, and in response to such request the judge then and there orally announced that said cause was dismissed; that said attorney so advised appellees; that the minute clerk of said judge, through some inadvertence, accident or mistake committed the error, mistake or accident of entering upon some trial calendar, or some paper or memorandum kept by him, the letter "t," indicating that said cause was for trial, instead of the letter "d," indicating that the same was dismissed; that appellees and their said attorney were in ignorance of the entry so made by the clerk until February 10, 1898, and relied wholly and entirely upon the order of the judge, announced in open court, and believed that said cause had been fully and finally disposed of and ended, until said February 10, 1898; that they are not indebted to appellant in any sum of money; that they are not liable to him for damages for breach of the contract which was made the basis of the suit at law against them, but on the contrary, that appellant is indebted to them in the sum of \$175 (setting out details of their transactions). The bill also makes other allegations which tend to show fraudulent concealment by appellant's attorney as to the true state of the record in the suit at law, and alleges that the cause was called for trial on January 31, 1898, in the absence of their said attorney, and without their knowledge, or that of either of them, or their said attorney, a hearing *ex parte* had, and said judgment obtained against them.

The January term, 1898, of the Superior Court ended February 5, 1898. Appellant moved the court to dismiss the bill for want of equity, and on the hearing of such motion the decree states "that the parties appeared before the court in person and by their counsel, and submitted proofs and argued the same," and proceeds to find certain facts, which need not be enumerated, for the reason that the court denied the motion to dismiss the bill, and ruled appellant to "plead, demur or answer instanter." Appellant refused to comply with the rule of the court, and elected "to abide by his motion to dismiss said bill for want of equity." The bill was thereupon taken as confessed against appellant, and the court decreed that the judgment be vacated and set aside, and a new trial granted. From this decree the appeal has been taken.

LEONARD GOODWIN and G. ALBERT McCULLUM, attorneys for appellant, contended that the negligence of the attorney is the negligence of the client and the client is bound thereby. *Kern v. Strausberger*, 71 Ill. 413; *Yates v. Monroe*, 13 Ill. 212; *Albro v. Dayton*, 28 Ill. 325; *Smith v. Powell*, 50 Ill. 21.

It is not enough that a judgment in a court of law is unjust, or is oppressive, or was obtained without hearing and considering the contention of both parties. Before the judgment at law will be set aside by a court of equity it must be shown, not only that it is unjust but that upon another trial at law a different result would be obtained and also that the original judgment was entered without any negligence or *laches* whatever upon the part of the party seeking to set it aside in a court of equity. Equity will interfere only where it appears that there was a defense of which the party could not have availed himself at law or of which he might have availed himself but was prevented by fraud or accident, unmixed with fraud or negligence on his own part, so that it is against conscience to execute a judgment. *Walker v. Shreve*, 87 Ill. 477; *Wilday v. McConnel*, 63 Ill. 278; *Hopkins v. Medley*, 99 Ill. 509.

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Where the judgment is valid on the face of the record equity will relieve therefrom for fraud, accident or mistake only where it appears that the judgment is not the result of *laches* or misconduct on the part of the complainant. *Smith v. Allen*, 63 Ill. 474; *Palmer v. Bethard*, 66 Ill. 529; *Walker v. Shreve*, 87 Ill. 477; *Blackburn v. Bell*, 91 Ill. 434; *Clark v. Ewing*, 93 Ill. 572; *Virginia v. Dunaway*, 17 Ill. App. 68; *Lavender v. Boaz*, 17 Ill. App. 421; *Owens v. Ranstead*, 22 Ill. 161; *Babcock v. McCamant*, 53 Ill. 214; *Wilday v. McConnel*, 63 Ill. 278; *Weaver v. Poyer*, 70 Ill. 567; *Higgins v. Bullock*, 73 Ill. 205; *Hopkins v. Medley*, 99 Ill. 509; *Sayles v. Mann*, 4 Ill. App. 516.

PARTRIDGE & PARTRIDGE, attorneys for appellees.

Courts of equity will take jurisdiction in a meritorious case and grant a new trial at law where the remedy at law has failed by reason of fraud, accident or mistake without negligence on the part of the defendant. *Metcalf v. Williams*, 14 Otto, 93; see also *Howe v. Mortell*, 28 Ill. 478; *Carrington v. Holabird*, 17 Conn. 530; *Dunlap v. Gregory*, 14 Ill. App. 601; *Allen v. Hoffman*, 12 Ill. App. 573; *Excelsior Electric Company v. Chicago Waif's Mission and Training School*, 41 Ill. App. 111.

A motion to dismiss for want of equity is in effect a general demurrer to the bill. It is in law an admission of the truth of the facts therein stated, and for the purposes of this case we must concede to appellant all such rights as the law would confer on him by reason of the actual existence of the facts stated in the bill. *Clark v. Ewing*, 93 Ill. 572, 575; *Titus v. Mabee*, 25 Ill. 257; *Knapp v. Marshall*, 26 Ill. 63; *Wangelin v. Goe*, 50 Ill. 459; *Weaver v. Poyer*, 70 Ill. 567.

There are two reasons why equity is slow to interfere with the operation of judgments recovered in a court of law. In the first place, it is sensitive to the imputation of seeking to usurp a species of appellate jurisdiction and so to extend its powers over all other courts. And secondly, a judgment on the merits ought to be forever conclusive

between the parties, no re-examination should be allowed, and it is neither the function nor the ambition of equity to overhaul judgments at law. Black on Judgments, Sec. 365.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

It is argued on behalf of appellant that certain affidavits, read in support of the bill on the motion to dismiss, are not sufficient to justify the decree of the chancellor in setting aside the judgment. However this contention may be, we think appellant has waived all question in that regard. He was given an opportunity to answer the bill, as appears from the record, of which he refused to avail himself, and allowed a decree *pro confesso* to be taken against him. In that state of the case, the chancellor need not have heard any evidence. Appellant will be held to have admitted the truth of all the allegations of the bill which were well pleaded, and we must look solely to the allegations of the bill to determine the correctness of the decree. Farnsworth v. Strasler, 12 Ill. 482; Mason v. Patterson, 74 Ill. 195.

In the former case it was held that where a bill is taken as confessed, error can not be assigned that the averments were not proved.

The sole question now to be considered is whether the allegations of the bill are sufficient to justify the decree.

The general rule is, as contended by appellant, that the negligence of the attorney is the negligence of the client; the client is bound thereby, and must look to the attorney if he suffers from the attorney's negligence. Kern v. Strausberger, 71 Ill. 413; Ward v. Durham, 134 Ill. 195; Bardonski v. Bardonski, 144 Ill. 284; Newman v. Schueck, 58 Ill. App. 328.

We are not prepared, however, to hold that this bill shows negligence on the part of appellees' attorney. It appears that when the case was called the attorney was in court and asked that the cause be dismissed for want of prosecution, and the judge announced that the case was so disposed of. That was an end of it so far as the attorney was con-

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cerned. He had a right to rely on the oral announcement of the judge as to what judgment was rendered in the case, and was not required to see that the clerk entered the order directed to be entered by the judge. 2 Pomeroy's Eq. Juris., Sec. 836; Allen v. Hoffman, 12 Ill. App. 573; Dunlap v. Gregory, 14 Id. 601; Beveridge v. Hewitt, 8 Ill. App. 467; Walker v. Kretsinger, 48 Ill. 502; Putnam v. Murphy, 53 Ill. 404.

The attorney, as well as appellees, had no knowledge until after the lapse of the January, 1898, term of the Superior Court, that the case had not been dismissed, as directed by the judge, nor that a judgment was entered. It was then too late to move in the law court to set it aside, and their only remedy was by bill in equity. If the allegations of the bill are true, their defense at law is complete. In the Beveridge case, *supra*, this court quotes from the Walker case, *supra*, viz.: "If it appears that the judgment complained of is unjust, and that the party in good faith has used or endeavored to employ the means given him by the law to assert his rights, and has been active and vigilant in his efforts to make his defense, and is still prevented from presenting a meritorious defense, equity will grant a new trial at law," and held that where the law court had rules that a new calendar would be made each term, and called and tried the suit upon a calendar made for a previous term, there being no notice to the defendant or his attorney, a judgment so rendered should be set aside and a new trial awarded, it further appearing that the defendant had a good defense. It was said in deciding the case, "so long as these rules remained in force, they were the law of the court," and that the attorney, after having ascertained that no calendar would be made for the term when his case was called, was not chargeable with negligence for failing to watch the call that month. If an attorney may rely on the rules of court, he may certainly rely on the judgment of the court announced from the bench.

The decree is affirmed.

Henry Lord Gay v. H. H. Kohlsaat et al.

1. **CORPORATIONS—*How Created.***—A corporation can not be constituted by the agreement of parties; it can only be created by or under a legislative enactment.

2. **SAME—*Liability of Stockholders, When Illegally Formed.***—When a corporation is illegally formed, its members are liable as partners for its acts or contracts; and all directors, officers and agents, acting and contracting in its name, are personally liable for their acts.

3. **ESTOPPEL—*As to Persons Acting as a Corporation.***—Persons who hold themselves out to the public to be a legally organized corporation, and proceed with the business for which they claim to be incorporated by contracting in the corporate name, are estopped to deny the existence of such corporation.

Suit in Chancery, to fix the liability of the officers of a corporation under Section 16, Chapter 32, R. S., concerning corporations. Trial in the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Judgment for defendant on demurrer to bill; appeal by complainants. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed February 9, 1899.

STATEMENT.

This is an appeal from a decree sustaining a demurrer to a bill filed by appellant against H. H. Kohlsaat, Stanley Waterloo, A. T. T. Packard, John B. Waldo, Montgomery Gibbs, F. E. Johnson, George Schneider, and the Chicago Press Club Auxiliary Association, and dismissing the bill.

The bill alleges facts showing that everything was done which by the statute is required to be done in order to procure from the Secretary of State a certificate of the complete organization of the "Chicago Press Club Auxiliary Association," and that November 17, 1892, such certificate was issued by the Secretary of State; that the object of the corporation was to construct a suitable building, to include library, reading and assembly rooms, for the proper use of the association; that its capital stock was \$1,000, divided into shares of \$100 each; that the subscriptions for shares of stock were as follows:

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NAMES.	SHARES.	AMOUNT.
William H. Park,	1	\$100
Stanley Waterloo,	1	100
W. M. Knox,	1	100
F. E. Johnson,	1	100
A. T. Packard,	1	100
John B. Waldo,	1	100
Geo. Schneider,	1	100
James W. Scott,	1	100
Montgomery Gibbs,	1	100
H. H. Kohlsaas,	1	100

August 8, 1892, at a meeting of the stockholders, all of the above named persons were elected directors, some for one year and some for two years then next ensuing, and that H. H. Kohlsaas was elected president, John B. Waldo secretary, and George Schneider treasurer, and that they accepted said offices and entered on the performance of their duties as such officers; that August 18, 1892, at a directors' meeting of said corporation, all of said appellees being present, a resolution was unanimously adopted engaging the complainant to act as the architect and perfect building plans and to have general supervision of the erection of the Press Club building, then contemplated by said corporation, upon terms and compensation of five per cent of the estimated cost of said building; that under this resolution the complainant was duly employed by said corporation, and, in pursuance thereof, he prepared preliminary plans, specifications and designs for said building, and negotiated party walls, and performed other services which were all accepted as satisfactory by the said corporation, with the knowledge and consent of appellees. The cost of the said building was estimated at \$125,000, and this was accepted as satisfactory by said corporation with the knowledge and consent of appellees; that the defendants (appellees) assented to the performance by complainant of all of said services and that the same were reasonably worth \$5,000; that after complainant's said services had been performed and accepted, and early in the year 1892, and while appellees were act-

ing as the officers and directors of said corporation, and holding it out to appellant and the world as a corporation, he was informed by the corporation that by reason of financial embarrassment, or some other cause, the building would not be constructed; that the corporation had paid to him \$1,000, and refused to pay him any more; that the corporation is insolvent, and that there are creditors of the corporation other than complainant, and that the bill is filed on behalf of himself and such other creditors. The bill, also, after averring the filing by J. C. Bundy, Stanley Waterloo and William A. Taylor, of a statement as required by section 2 of the act concerning corporations, in the office of the Secretary of State, and the receipt by them of a license, as commissioners, to open books for subscription to the capital stock, contains the following :

“ That upon the receipt of said license to open books of subscription, and the subscription for and of said stock, as aforesaid, and from and after the 18th day of July, 1892, said association assumed and exercised the functions and privileges of a corporation and began and continued to carry out the objects of incorporation enumerated in said statement, and henceforth acted and dealt as a corporation, and was in all respects a corporation in fact, and was managed, treated and held out to the world and to your orator as a corporation by the defendants, and your orator was led by the said defendants and each of them to deal with said Chicago Press Club Auxiliary Association, in the matters hereinafter mentioned, as a corporation in fact and in law, knowing naught to the contrary; and your orator therefore avers that the said Chicago Press Club Auxiliary Association, so far as concerned your orator and the subject-matter of this suit, was, at all times herein mentioned, a stock corporation in fact and in law, within the full meaning and effect of section 16.”

The prayer of the bill is for an accounting and a decree against the defendants for the amount of the company's indebtedness in excess of the amount of the capital stock, etc.

KRETZINGER, GALLAGHER & ROONEY, attorneys for appellant, contended that a bill in chancery is the proper method

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of enforcing the liability under Section 16, Chapter 32, R. S., "Concerning Corporations." *Low v. Buchanan*, 94 Ill. 76.

This statute is not penal, but remedial, in character. *Woolverton et al. v. Taylor et al.*, 132 Ill. 197. Judgment against the corporation is unnecessary. *Id.*

Appellees as directors and officers of the Chicago Press Club Auxiliary Association will not be heard in this suit to say that said company was not a corporation. *Slocum v. Providence Steam & Gas Co.*, 10 R. I. 112; *Newcomb v. Reed*, 12 Allen, 362; *Attorney Gen. v. Simonton*, 78 N. Car. 57; *Hagerman v. O. B. & S. Ass'n*, 25 Ohio S. 186; *Stone v. East Berkshire Cong. Soc.*, 14 Ver. 86; *Curtis v. Tracy*, 169 Ill. 233; *Eaton v. Aspinwall*, 19 N. Y. 119; *Bushnell v. Consolidated Ice Machine Co.*, 138 Ill. 67; *McCarthy v. Lavasche*, 89 Ill. 270; *U. S. Express Co. v. Bedbury*, 34 Ill. 459; *Hickling v. Wilson*, 104 Ill. 54; *Fitzpatrick v. Rutter*, 58 Ill. App. 532; *R. R. Co. v. Cary*, 26 N. Y. 75; *Hause v. Manheimer*, 69 N. W. Rep. 810.

PRUSSING & McCULLOCH, attorneys for appellees.

No certificate of complete organization of the alleged corporation was ever recorded in the office of the recorder of deeds, as required by Secs. 30 and 4 of the act concerning Corporations, Chap. 32, Illinois Revised Statutes.

Until such certificate is recorded there can be no corporation. Secs. 30 and 4, Chap. 32, Ill. R. S.; *Loverin v. McLaughlin*, 161 Ill. 423; *Loverin v. McLaughlin*, 46 Ill. App. 373; *Ricker v. Larkin*, 27 Ill. App. 625; *Cresswell v. Oberly*, 17 Ill. App. 281; *Gent v. Mfrs. & Merchants Mutual Ins. Co.*, 107 Ill. 652; *Bigelow v. Gregory*, 73 Ill. 197; *Stowe v. Flagg*, 72 Ill. 397; *Diversey v. Smith*, 103 Ill. 378; *McCormick v. Market Nat. Bank*, 162 Ill. 100; *McCormick v. Market Nat. Bank*, 165 U. S. 538; *Utley v. Union Tool Co.*, 77 Mass. 139; *Richardson v. Pitts*, 71 Mo. 128; *Hurt v. Salisbury*, 55 Mo. 310.

No liability can arise under Sec. 16 of the act concerning corporations unless there is a stock corporation fully organized in compliance with the act of which said Sec. 16 is a part.

Capital stock is no necessary part of a corporation not for pecuniary profit.

The amount of the capital stock of a corporation for pecuniary profit is not fixed until the corporation is completed.

The "assent" contemplated by the statute is assent to the creation of an indebtedness. *Lewis v. Montgomery*, 145 Ill. 47.

Until the incorporation is completed, no indebtedness in excess of the amount of the capital stock or otherwise can be created.

"That a corporation should have a full and complete organization and existence as an entity before it can enter into any kind of a contract or transact any business, would seem to be self-evident." * * * "As well say a child *in ventre sa mere* may enter into a contract, or that its parents may bind it by contract. A corporation, until organized, has no being, franchises or faculties." *Gent v. Manf. & Merchants' Ins. Co.*, 107 Ill. 658; *McCormick v. Market Nat. Bank*, 162 Ill. 100; *McCormick v. Market Nat. Bank*, 165 U. S. 538; *Loverin v. McLaughlin*, 161 Ill. 423; *Loverin v. McLaughlin*, 46 Ill. App. 373; *Ricker v. Larkin*, 27 Ill. App. 625; *Cresswell v. Oberly*, 17 Ill. App. 281; *Bigelow v. Gregory*, 73 Ill. 197; *Diversey v. Smith*, 103 Ill. 378.

While the liability imposed by said Sec. 16 is not penal, "it is like that of a surety, and therefore *stricti juris*." *Lewis v. Montgomery*, 145 Ill. 47; *Woolverton v. Taylor*, 132 Ill. 209.

No such liability of officers or directors exists at common law. It exists only by virtue of the statutes of the sovereignty creating it. When so created, it exists only as created, strictly within the limits of the statute. *Knower v. Haines*, 31 Fed. Rep. 514; *Pollard v. Bailey*, 20 Wall. (87 U. S.) 520; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 756.

No liability arises under said Sec. 16 in cases of incomplete or so-called *de facto* organizations.

A liability is fixed by Sec. 18 of said act for assuming to exercise corporate powers before fully complying with all

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the provisions of the act; thus showing that incomplete or so-called *de facto* organizations were not intended to be included within provisions of said Sec. 16. Sec. 18, Chap. 38, Ill. R. S.

A corporation can not be created by estoppel; it is a creation of the State. 2 Morawetz on Corporations, 747, note; Hargrave v. Bank of Ills., 1 Ill. 84 (Beecher's Ed. 122); Stowe v. Flagg, 72 Ill. 397; Bigelow v. Gregory, 73 Ill. 201-202; Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 20.

The doctrine of estoppel, attempted to be invoked by complainant, has no application to this case.

"The term estoppel is derived from the French word *estoupe*, whence the English word stopped, and it is called an estoppel, or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." 1 Herman on Estoppel, 1; Coke upon Littleton, 352a.

Its effect is to prevent a showing of certain facts.

In this case the bill itself shows that there was no corporation and therefore there could not be any "amount of the corporate stock" fixed, nor any "indebtedness of any stock corporation" nor any "directors and officers of such corporation assenting thereto."

There is no estoppel when the truth appears. Bigelow on Estoppel (5th Ed.), 361; Herman on Estoppel, Sec. 588, page 722.

"Estoppels are odious and not favored in law." Keith v. Lynch, 19 Ill. App. 577; 1 Herman on Estoppel, 10, Sec. 15.

A corporation can not be created by estoppel. 2 Morawetz on Corporations, 747, note; Hargrave v. Bank of Illinois, 1 Ill. 84 (Beecher's Ed. 122); Stowe v. Flagg, 72 Ill. 397; Bigelow v. Gregory, 73 Ill. 201, 202.

The person who claims the benefit of estoppel must show that he was permissibly ignorant of the truth. Bigelow on Estoppel (5th Ed.), 626.

A person dealing with a corporation or supposed corpora-

tion must at his peril take notice of the terms of its charter and of the provisions of the statute creating it, and of the authority of its agents or supposed agents. Morawetz on Corporations (2d Ed.), Secs. 591, 592, 580; 1 Beach on Corporations, p. 626, Sec. 383; McCormick v. Market Nat. Bank, 165 U. S. 550; Alexander v. Cauldwell, 83 N. Y. 480.

MR. JUSTICE ADAMS delivered the opinion of the court.

The question is whether the facts alleged in the bill entitle appellant to relief.

Section 16 of chapter 32 of the statutes is as follows: "If the indebtedness of any stock corporation shall exceed the amount of its capital stock, the directors and officers of such corporation assenting thereto shall be personally and individually liable for such excess to the creditors of such corporation."

It is apparent from the bill that at the time the indebtedness to appellant was contracted, the Chicago Press Club Auxiliary Association was not a legally organized corporation for the purpose of engaging in its contemplated business, because its certificate of complete organization was not issued until about three months after that time, and the contention of counsel for appellee is, that the bill showing, as it does, that the association was not a corporation *de jure*, the decree sustaining the demurrer and dismissing the bill was proper. On the other hand, counsel for appellant contend that the bill shows that appellees held out to the world and to him, that the association was a legally organized corporation; that they acted as its officers and directors, and in its name, and in all respects as if it were a corporation, and that, by reason of the appellees so acting, appellant was led to deal with the association as a corporation, knowing nothing to the contrary, and that, under these circumstances, the appellees are estopped to say that the association was not a legally organized corporation.

Appellees' counsel lay a great stress on the fact that it is shown by the bill itself that the association was not a *de jure* corporation, but this is a mere matter of pleading, and we

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do not regard it as important, if the bill also avers facts which, if true, would estop the appellees from denying legal organization.

In *McCarthy v. Lavasche*, 89 Ill. 270, the appellant was sued as a stockholder of a corporation chartered by special act of the legislature, and the plaintiff, in his declaration, set up the clause of the charter imposing liability on stockholders. The act was, therefore, before the court by virtue of the plaintiff's pleading, and if unconstitutional, this was apparent from plaintiff's pleading, of which the act, by reference, was a part; yet the court held that the defendant, having subscribed for stock in the corporation, was estopped to question the constitutionality of the act, even though it was unconstitutional, and he was held liable. In *United Growers Co. v. Eisner*, 47 N. Y. Supp. 906, which was also a suit against a stockholder, it was objected that it *affirmatively* appeared that the company was not properly incorporated, notwithstanding which, the court held that the defendant was estopped by his acts from defending on that ground.

In *Merrick v. Reynolds E. & G. Co.*, 101 Mass. 381, the company was sued as a corporation. It affirmatively appeared in a stipulation of facts on which the suit was tried, that the company, at the time of making the contract sued on, had not complied with a statutory requirement, compliance with which was made by the statute a condition precedent to commencing business; yet the court held the company liable on the principle of estoppel. Suppose that the bill in the present case, by way of anticipation of appellees' defense, had charged or averred that the defendants would claim that, at the time of contracting with complainant, as stated in the bill, its certificate or complete organization had not been issued, and therefore it was not a legally organized corporation, but that, conceding the same to be true, defendants should not be heard to make such defense, because, etc. (averring facts which would estop them); this would be proper pleading, and in accordance with the precedents (1 Dan. Ch. Pr. & Pl. 373; *Puter-*

baugh's Ch. Pl. & Pr. 55-56), and would not preclude the complainant from relying on the estoppel. Instead of so pleading, the appellant has merely averred the facts, which, although, perhaps, less formal, does not change the substance of the matter, and a court of equity looks to substance rather than form. Beach's Mod. Eq. Juris., Sec. 7; 1 Pomeroy's Eq. Juris. 263.

The association was fully organized as a corporation when it had complied with the statutory requirements prerequisite to the issuance of its certificate of complete organization. Had it not been, the certificate could not have been issued. It had a regularly elected board of directors and regularly elected officers, and proceeded in the usual way to accomplish one of the objects of its incorporation, viz., "to construct a suitable building," and, as reasonably if not necessarily incidental thereto, to employ an architect to prepare plans for and supervise the erection of the building. Appellees held out to the public and to appellant that it was a legally organized corporation, by proceeding with the business for which it was incorporated, and by contracting in the corporate name. Had the association sued appellant in the corporate name for a breach of his contract, he, having dealt with it as a corporation, would have been estopped to deny its corporate existence, and appellees are equally estopped to so deny. *McCarthy v. Lavasche*, 89 Ill. 270; *Bushnell v. Consolidated I. M. Co.*, 138 Ib. 67; *Curtis v. Tracy*, 169 Ib. 233; *U. S. Express Co. v. Bedbury*, 34 Ib. 459, 467; *Tarbell v. Page*, 24 Ib. 46; *Swartwout v. Railroad Co.*, 24 Mich. 389.

In *Loverin v. McLaughlin*, 161 Ill. 417, the court quotes with approval this language from Beach on Priv. Corp.: "If a corporation be illegally formed, its members or stockholders are liable as partners for its acts or contracts; and directors, officers and agents, acting and contracting in its name, are personally liable."

The decree will be reversed and the cause remanded.

Henry W. Hoyt and Henry J. Edwards v. Emilie Hasse.

1. **CORPORATIONS**—*Section 18 of the Act Concerning Corporations to be Strictly Construed.*—The provisions of Section 18 of Chapter 32, R. S., concerning corporations, providing that if any person or persons act as, or pretend to be, officers or agents, or boards of directors, of any stock corporation, or pretended stock corporation, without complying with the provisions of the act, before all stock named in the articles of incorporation shall be subscribed in good faith, they shall be jointly and severally liable for all debts and liabilities made by them, and contracted in the name of such pretended corporation, should be interpreted according to their plain and obvious meaning, and not extended by construction so as to embrace cases not clearly within the terms of the statute.

2. **STATUTES**—*Construction of Section 16 of the Act Concerning Corporations.*—Section 16 of Chapter 32, R. S., entitled "Corporations," making directors assenting to indebtedness of a corporation in excess of the amount of its capital stock liable for such excess, imposes a burdensome liability upon such officers for their wrongful acts, and should be considered a penal statute in the sense that it should be strictly construed.

3. **DIRECTORS**—*Liability Under Section 18 of the Act Concerning Corporations.*—Section 18 of the act concerning corporations does not render directors liable for debts contracted by their predecessors in office.

4. **PARTNERS**—*Individual Liability for Debts Previously Incurred.*—A partner in a copartnership firm is not liable for debts incurred by the firm previous to his having become a partner.

5. **QUESTION OF FACT**—*Giving a Note in Payment as Evidence of a Pre-existing Debt.*—The question as to whether a note is taken in payment of a pre-existing debt is one of fact for the determination of the jury.

6. **INSTRUCTION**—*Usurping the Province of the Jury.*—An instruction which excludes from the consideration of the jury any matter material to the determination of the questions at issue is erroneous.

Suit to Charge Defendants with a Violation of Sec. 18 of Chap. 32, R. S.—Trial in the Circuit Court of Cook County; the Hon. CHARLES E. FULLER, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendants. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed February 9, 1899.

HAWLEY & PROUTY, attorneys for Henry W. Hoyt, appellant.

Appellant Henry W. Hoyt did not make, or participate

in making, the debt for the discovery of which the judgment appealed from was rendered. The entire transaction was *res inter alios acta*.

In order to charge a director of a *de facto* corporation with personal liability for a debt of the corporation, under section 18 of the general act concerning corporations, some active agency or participation by the director to be charged, in the transaction by which the debt was created, must be shown.

The statute is as follows :

"Sec. 18. If any person or persons being or pretending to be, an officer or agent, or board of directors, of any stock corporation, or pretended stock corporation, shall assume to exercise corporate powers, or use the name of any such corporation, or pretended corporation, without complying with the provisions of this act (or) before all stock named in the articles of incorporation shall be subscribed in good faith, then they shall be jointly and severally liable for all debts and liabilities made by them, and contracted in the name of such corporation or pretended corporation." 1 Starr & Curtis' Ann. Ill. Stat. (2d Ed.), 1009, Ch. 32, Sec. 18.

This provision remained dormant and practically meaningless to the profession for nearly twenty years after the passage of the act, and until this court in *Loverin v. McLaughlin*, 46 Ill. App. 373, and later the Supreme Court, in affirming the same case, 161 Ill. 417, by interpolating the word "or" between the words "act" and "before" in the sixth line of the section, gave to it a somewhat startling scope and significance, holding that the omission to file the certificate of complete organization of a corporation created under the general act, in the office of the recorder of deeds of the county in which the principal office of the company was located, as required by section 4 of the act, rendered the directors of the company personally liable for debts made by them, and contracted in the name of the corporation.

This result was arrived at, in part, by construing section 4 of the act, (which provides, among other things, that upon the recording of the certificate of complete organization,

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including as a part thereof a copy of all papers filed in the office of the Secretary of State in and about the organization of the corporation, in the office of the recorder of deeds, the corporation shall be deemed fully organized and may proceed to business,) to mean that the corporation is not fully organized, and to prohibit the exercise of corporate powers until after such recording of the certificate, in accordance with the principle of statutory construction that "a provision that certain things shall be done, to constitute a license or authority, is equivalent to an express prohibition against the license or authority unless those things shall be done," and other rules of construction applied in *Diversey v. Smith*, 103 Ill. 378, and *Loverin v. McLaughlin*, 161 Ill. 417.

So far as the language of the opinion in the *Loverin* case (161 Ill. 417) is pertinent to the subject of participation, it fortifies our contention. In construing section 18 of the act Mr. Justice Magruder, speaking for the court, says :

"That section provides that the officers or directors 'shall be jointly and severally liable for all debts and liabilities made by them and contracted in the name of such corporation or pretended corporation.' *This language presupposes a contract between the creditors and the directors or officers in the name of the corporation.* A contract must be between two parties." 161 Ill. 434.

The obvious scope and meaning of the words "*made by them,*" as employed in reference to directors, officers or agents, and the debts, liability for which is imposed by the section, require that a director or officer should have taken some active part in contracting the debt with which he is sought to be charged under the section. This view is strongly supported by the analogy of cases arising under section 16 of the act, which provides that "if the indebtedness of any stock corporation shall exceed the amount of its capital stock, the directors and officers of such corporation assenting thereto shall be personally and individually liable for such excess to the creditors of such corporation." 1 Starr & Curtis' Ann. Ill. Stat. (2d Ed.), 1007, Ch. 32, Sec. 16.

It is true the nature of the liability imposed by the latter section is essentially different from that provided by section 18.

While the language of section 18 presupposes a contract between the creditor and directors or officers of the corporation, and there can manifestly be no liability under the section in the absence of a contract, nevertheless the liability is not contractual, but penal. "The creditor's right of recovery is totally unaffected by any actual loss or injury he may have sustained by the failure or neglect of the officers or directors." The fact that the company itself is solvent and abundantly able to pay the debt, does not absolve the directors or officers who made the debt from liability under the section, the object of which is to inflict a punishment for its violation. The liability being penal it is enforceable, therefore, only at law, as equity does not enforce penalties. *Loverin v. McLaughlin*, 161 Ill. 417; *Curtis v. Tracy*, 169 Ill. 233.

On the other hand, section 16, while not rendering the contracting of debts in excess of the capital stock of a corporation unlawful, makes the directors assenting to such excess personally and individually liable therefor to the creditors of the company. The liability is contractual, not penal, and is, like that of a surety, *stricti juris*, and does not attach so long as the debt can be made out of the company. The liability is not imposed in favor of some particular creditor, but in favor of all the creditors of the company as a body, and it is enforceable only in a court of equity. *Woolverton v. Taylor*, 132 Ill. 197; *Lewis v. Montgomery*, 145 Ill. 30; *Horner v. Henning*, 93 U. S. 228.

However, the rules of construction applicable to the words "assenting thereto," in the 16th section, and the words "made by them," in the 18th section, as well as the meaning of the two phrases, are essentially the same.

The liability under the former section is *stricti juris*, and under the latter it is penal. In either case the statute is to be strictly construed against those seeking to enforce the liability. The words employed should be interpreted according to their plain and obvious meaning, and should not be extended by construction so as to embrace cases not clearly within the terms of the statute. *Lewis v. Montgomery*, 145

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Ill. 30; 3 Thompson's Com. on Law of Corp., Sec. 4164; Rorke v. Thomas, 56 N. Y. 559.

In other States, where statutes containing provisions of this character, which impose personal liability on directors for corporate debts, for failing to make reports, or for making false reports, etc., such as the provisions of the New York manufacturing companies act, have been frequently made the subjects of judicial construction, they are regarded as giving creditors cumulative remedies for the collection of corporate debts, and not in any sense as imposing on directors or officers a punishment for an offense against the State, although they are treated as penal in character, in that they tend to conflict with the general policy of acts providing for the formation of corporations, which is, "immunity from personal liability, and also because they subject directors to a burdensome liability," and they are, therefore, strictly construed in all courts. *Garrison v. Howe*, 17 N. Y. 458; *Boughton v. Otis*, 21 N. Y. 261; *Shaler and Hall Quarry Co. v. Bliss*, 27 N. Y. 297; *Merchants' Bank of New Haven v. Bliss*, 35 N. Y. 412; *Miller v. White*, 50 N. Y. 137; *Rorke v. Thomas*, 56 N. Y. 559; *Adams v. Mills*, 60 N. Y. 533; *Reed v. Keese*, Id. 616; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Wiles v. Suydam*, 64 N. Y. 173; *Cameron v. Seaman*, 69 N. Y. 396; *Jagger Iron Co. v. Walker*, 76 N. Y. 521; *Losee v. Bullard*, 79 N. Y. 404; *Pier v. Hammore*, 86 N. Y. 95; *Gadsden v. Woodward*, 103 N. Y. 242; *Huntington v. Attrill*, 118 N. Y. 365; *Cincinnati Cooperage Co. v. O'Keeffe*, 120 N. Y. 603; *Diversey v. Smith*, 103 Ill. 378; *Gregory v. German Bank of Denver*, 3 Col. 332; *Union Iron Co. v. Pierce*, 4 Biss. 327; *Steam Engine Co. v. Hubbard*, 101 U. S. 188; *Attrill v. Huntington*, 70 Md. 191; *Huntington v. Attrill*, 146 U. S. 657; *Park Bank v. Remsen*, 158 U. S. 337; *Moore v. Lent*, 81 Cal. 502; *Irvine v. McKeon*, 23 Cal. 472; *Windham Prov. Inst. v. Sprague*, 43 Vt. 502.

Section 18 of the act concerning corporations does not render directors liable for debts contracted by their predecessors in office.

The precise question here presented was decided by the

Court of Appeals of the State of New York as long ago as the year 1860, in *Boughton v. Otis*, 21 N. Y. 261.

The provision of the statute there under consideration was section 12 of the manufacturing companies act of 1848, referred to in a former branch of the argument, and was in the following language:

“Every such company shall annually, within twenty days from the 1st day of January, make a report which shall be published in some newspaper published in the town, city or village, or if there be no newspaper published in said town, city or village, then in some newspaper published nearest the place where the business of said company is carried on, which shall state the amount of capital, and the proportion actually paid in, and the amount of its existing debts, which report shall be signed by the president and a majority of the trustees; and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on; and if any of said companies shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made.” 1 Rev. Stat. N. Y. (1852), 1217.

And the question has been ruled the same as in *Boughton v. Otis*, *supra*, wherever it has arisen. *Shaler and Hall Quarry Company v. Bliss*, 27 N. Y. 297; *Steam Engine Co. v. Hubbard*, 101 U. S. 188; *Sullivan v. Sullivan Mfg. Co.*, 24 S. C. 341; *Fuller v. Rowe*, 57 N. Y. 23; *McHarg v. Eastman*, 7 Robt. (N. Y.) 137; *Vincent v. Sands*, 11 Abb. Pr. (N. S.) 366, 370; *Windham Prov. Inst. v. Sprague*, 43 Vt. 502; *Austin v. Berlin*, 13 Col. 198; *Bank v. Hill*, 56 Me. 385; 3 *Thomp. Com. on Law of Corp.*, Secs. 4206-4209.

It is a rule, well settled and repeatedly recognized in the Supreme Court of this State, that taking a note, either of the debtor or of a third person, for a pre-existing debt, is no payment, unless it be expressly or impliedly agreed to take the note as payment, and to run the risk of its being paid, or unless the creditor parts with the note, or is guilty of *laches* in not presenting it for payment in due time. *Stone and Gravel Co. v. Gates Iron Works*, 124 Ill. 623; *Belle-*

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ville Savings Bank v. Bornman, 124 Ill. 200; Jansen v. Grimshaw, 125 Ill. 468, 476; Chisholm v. Williams, 128 Ill. 115; Paddock v. Stout, 121 Ill. 571, 579; Bond v. Liv. & London & Globe Ins. Co., 106 Ill. 654; Walsh v. Lennon, 98 Ill. 27, 31; Wilhelm v. Schmidt, 84 Ill. 183, 187; Yates v. Valentine, 71 Ill. 643; Corrigan v. Reilly, 64 Ill. App. 531; Medley v. Specker Bros. & Co., 58 Ill. App. 157.

A. W. MARTIN, attorney for appellant Henry J. Edwards.

Counsel for appellant Hoyt have so exhaustively discussed the various points involved that it is not necessary for me to enter into a discussion.

The section of the statute attempted to be enforced in this case is a penal statute, and it is a well-settled rule of law that penal statutes are to be construed strictly and are never to be extended by mere implication to either persons or things not expressly brought within their terms. 23 Am. & Eng. Ency. of Law, 375; People, etc., v. Peacock, 98 Ill. 172; Woolverton v. Taylor, 132 Ill. 197; Hankins v. People, etc., 106 Ill. 628.

This rule applies not only to statutes relating to criminal offenses, but also to all statutes which impose as punishment, any penalties, pecuniary or otherwise, or forfeitures of money or other property, or of vested rights, etc., whether such penalties, forfeitures, etc., are to be enforced or recovered at the suit of the State or a private individual. Hines v. Wilmington, etc., R. R. Co., 95 N. C. 434; Coble v. Shoffner, 75 N. C. 42; Bay City, etc., R. R. Co. v. Austin, 21 Mich. 390; Commonwealth v. Standard Oil Co., 101 Pa. St. 119; Marston v. Tryon, 108 Pa. St. 270; Cole v. Groves, 134 Mass. 471; Hanks v. Brown, 79 Ia. 560, 563; Allen v. Stevens, 29 N. J. Law, 509.

Statutes which impose upon stockholders the liability for corporate debts are to be construed strictly, and not to be extended beyond the plain meaning of the language employed. Gray v. Coffin, 9 Cush. 192; Dane v. Dane Mfg. Co., 14 Gray, 489; O'Reilly v. Bard, 105 Pa. St. 569; Chamberlain v. Huguenot Mfg. Co., 118 Mass. 532; Mean's Appeal,

85 Pa. St. 75; Moyer v. Pa. Slate Co., 71 Pa. St. 293; Youghieny Shaft Co. v. Evans, 72 Pa. St. 331; Chace v. Lord, 77 N. Y. 1.

Statutes which are criminal or penal are not elastic and can not be made to include cases without the letter, although within the reason and policy of the law. Hanks v. Brown, 79 Ia. 560; State v. Lovell, 23 Ia. 304; Bond v. Railway Co., 67 Ia. 714; Boughner v. Meyer, 5 Col. 71; Shaw v. Clark, 49 Mich. 385; Sundheim v. Gilbert, 18 N. E. Rep. 690.

Interpolation and the insertion of words and exceptional construction generally, although necessary to effect the evident intention of the lawmakers, have been forbidden in acts within the rule of strict construction. Am. & Eng. Ency. of Law, Vol. 23, pg. 420; Coe v. Lawrence, 1 El. & Bl. 516; Thomas v. Stevenson, 2 El. & Bl. 108; S. W. R. R. Co. v. Cohen, 49 Ga. 627.

CONSIDER H. WILLETT and LOUIS KARCHER, attorneys for appellee.

As a matter of law the giving of a promissory note is *prima facie* evidence of a payment of an account for which such note may be given.

By the introduction of the note the appellee has made out a *prima facie* case that the account for which the note was given was paid and merged into such note. Carroll v. Holmes, 24 Ill. App. 453. The acceptance of a promissory note is *prima facie* the satisfaction and payment of an open or book account, the antecedent debt for which it is given. Fridley v. Bowen, 5 Ill. App. 191.

The law is well settled that where the debtor's own negotiable note is taken for a pre-existing debt it is *prima facie* evidence of payment. McConnell v. Stettinius, 2 Gil. 707; Miller v. Lumsden, 16 Ill. 161; Morrison v. Smith, 81 Ill. 221; 2 Greenleaf on Evidence, 492, Secs. 519 and 520; Yates v. Valentine, 71 Ill. 643; Hough v. Aetna Life Ins. Co., 57 Ill. 318; Belleville Sav. Bank v. Bornman, 124 Ill. 200.

Appellee sued the appellants and Frank E. Barnard, Austin L. Nestlorode, John W. Hasse and Henry J. Ed-

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wards, as directors of the Thompson & Edwards Fertilizer Company, charging them, as such directors, with a violation of section 18 of the general law for the incorporation of private corporations, in exercising corporate powers and using the name of said corporation without complying with the provisions of the law. The jury found the issues for appellee and assessed her damages at the sum of \$311.95, and judgment was rendered on the verdict against all the defendants. From this judgment Hoyt and Edwards appealed. No question is raised as to the sufficiency of the pleadings.

The facts are substantially as follows: The certificate of the complete organization of the "Thompson & Edwards Fertilizer Company" was issued by the Secretary of State, January 15, 1886. It appears from its articles of incorporation that its object was "The manufacture and sale of commercial fertilizers;" that its capital stock was \$100,000, the number of its shares of stock 1,000 of \$100 each, and the location of its principal office, the Union Stock Yards, in Chicago, Cook county, Illinois. A copy of its certificate of complete organization was not filed for record in the office of the recorder of deeds of Cook county, as required by section 4 of the statute. The company became indebted to appellee in the year 1894 and prior years in a considerable amount. The indebtedness consisted partly of money loaned by appellee to the company and partly of wages earned by her husband and two of her sons working for the company, which wages were, by the consent of her husband and sons, credited to her on the company's books, and receipted for to her by the company as cash. The last cash credit to her account on the books of the company is of date December 23, 1894, and it is not claimed that after that date she advanced any money to the company, or that she was entitled to any credit for the wages of her husband or sons. Appellant Edwards was one of the original directors, and appellant Hoyt first became a stockholder in May, 1895, and first became a director June 18, 1895.

January 14, 1897, at a meeting of the board of directors,

A. L. Nestlerode was made general manager of the company. The board then consisted of five directors, three of whom, H. W. Hoyt, A. W. Martin and F. E. Barnard, were present at the meeting. February 27, 1897, at a meeting of the board of directors, Hoyt, Martin, Edwards, Hasse and Barnard being present, the minutes of the meeting of January 14, 1897, were read and approved; also article 12 of the by-laws of the company was so amended as to read as follows:

“The president, vice-president and secretary and treasurer (one person) shall jointly be empowered to buy, sell, mortgage, or lease any real estate and execute deeds therefor. The secretary and treasurer shall be empowered to sign and indorse notes, checks and drafts necessary for the ordinary business of the company; but all such notes, checks and drafts must be countersigned by the general manager.”

April 4, 1897, the following note was executed and delivered to appellee:

“\$324.00

CHICAGO, Apr. 14, 1897.

Six months after date we promise to pay to the order of Mrs. Wm. Hasse three hundred twenty-four & 3-100 dollars, payable at our office, U. S. Yards, value received, with interest at six per cent after maturity.

THOMPSON & EDWARDS FERTILIZER Co.

F. E. BARNARD,

Secy. & Treas.”

“Countersigned:

A. L. NESTLERODE,

Gen'l Manager.”

Indorsed thereon is the following:

“Paid on the within note, \$24.03.”

It was admitted that the appellee is the Mrs. William Hasse named in the note.

When the note was given, F. E. Barnard was secretary and treasurer of the company, and A. L. Nestlerode was its general manager.

It appears from Barnard's testimony that at the time the note was given, the company owed appellee \$524.03. He stated that appellee came to him, desiring her money, and says:

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“She finally made the proposition that if I would pay her a portion in cash, and the balance in a note due in six months, that she could use the note. I did so, paying her \$200 in cash and \$324.03 in a note, closing the account.”

MR. JUSTICE ADAMS delivered the opinion of the court.

Section eighteen of the statute, for the violation of which appellants are sought to be charged, is as follows :

“Section 18. If any person or persons, being, or pretending to be, an officer or agent, or board of directors, of any stock corporation, or pretended stock corporation, shall assume to exercise corporate powers, or use the name of any such corporation, or pretended corporation, without complying with the provisions of this act, before all stock named in the articles of incorporation shall be subscribed in good faith, then they shall be jointly and severally liable for all debts and liabilities made by them, and contracted in the name of such corporation, or pretended corporation.”

As construed by the court in *Loverin v. McLaughlin*, 161 Ill. 417, the section must be read as if the word “or” occurred next after the word “act” in the section.

The indebtedness of the company to appellee for cash advanced by her, and the wages earned by her husband and sons and credited to her as cash, having been incurred before appellant Hoyt became a director of the company, he can not be held liable as a director for that indebtedness. That indebtedness or liability can not be said to have been made by him, and to hold him under the statute he must have participated, at least, in the making of the debt or liability. *Lewis et al. v. Montgomery et al.*, 145 Ill. 30.

Appellee’s counsel admit the correctness of this proposition, saying: “Appellee does not insist that section 18 of the act concerning corporations renders directors liable for debts contracted by their predecessors in office.” The contention of appellee’s counsel is, that the note was given and received in payment of the prior indebtedness of the company to appellee; that such being the case, a new liability on the part of the company was created, and that article 12 of the by-laws, as amended February 27, 1897,

authorized the creation of this new liability, in the manner stated. Whether the first proposition is true, is a question of fact; each of the second and third propositions involves merely a question of law. The question of fact, namely, whether the note was given and received in payment, was a question for the determination of the jury. *Belleville Savings Bank v. Bornman et al.*, 124 Ill. 200, 207, and cases there cited.

Appellee's counsel, in their argument, concede this proposition. But the court excluded this question from the jury, as will clearly appear when we come to consider the instructions. This being true, the judgment can not be sustained on the theory of appellee's counsel, based, as it is, on the proposition that there was an agreement that the note should operate as payment. But we can not accede to the proposition that article 12 of the by-laws, as amended February 27, 1897, authorized or contemplated the making an agreement that a note executed to a creditor of the company should operate as payment of the indebtedness evidenced by the note. The part of article 12 relied on as being such authority is as follows :

"The secretary and treasurer shall be empowered to sign and indorse notes, checks and drafts necessary for the ordinary business of the company; but all such notes, checks and drafts must be countersigned by the general manager."

There is no evidence that it was necessary, in the ordinary business of the company, to agree that its notes, executed in consideration of indebtedness previously incurred, should be accepted by its creditors in payment of such indebtedness, and it is matter of common knowledge that this is not necessary in the ordinary course of the business of corporations, and that, on the contrary, it is exceptional and unusual.

It is unnecessary to the decision of the present case to decide the question whether, if the note was given and received in payment of the prior indebtedness of the company to appellee, a new indebtedness or liability, within the meaning of the statute, was thereby created, and on that

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question the court expresses no opinion. The writer, however, is of the opinion that in such case there would be no new liability, within the meaning of the statute. Appellee's counsel contend that appellants are liable as partners, and have discussed that question at considerable length. But even though it should be conceded, as matter of law, that they could be so held, the contention can not prevail, because the evidence shows, without contradiction, that appellant Hoyt did not become a stockholder till May, 1895, or a director till June 18, 1895. The indebtedness to appellee was incurred prior to the year 1895, and it is well settled that a partner in a copartnership firm is not liable for debts incurred by the firm previous to his having become a partner. Story on Partnership (7th Ed.), Sec. 146, *et sequentes*, and notes.

The judgment being a unit, if erroneous as to Hoyt is also erroneous as to Edwards. *St. R. R. Co. v. Morrison, etc., Co.*, 160 Ill. 288, 295, and cases cited; *Finance Co., etc., v. Hanlon*, 75 Ill. App. 188.

The court gave to the jury, at the request of appellee's counsel, the following instructions:

1. "The jury are instructed, as a matter of law, that if they find from the evidence that the document known as the final certificate of incorporation, commonly called a charter, offered in evidence, was issued by the Secretary of the State of Illinois, for a proposed corporation entitled the 'Thompson & Edwards Fertilizer Company,' and that said charter recites that the principal office of said corporation was to be located in the city of Chicago, in the county of Cook and State of Illinois, and that such final certificate, or charter, was never recorded in the office of the recorder of deeds of said Cook county;

"And, if the jury further find from the records of said alleged corporation, and from the evidence in the case, that the defendants Henry W. Hoyt and Henry J. Edwards were, with other persons, directors of said alleged corporation at the time that Frank E. Barnard, acting as the secretary and treasurer of said alleged corporation, and A. L. Nestlerode, acting as the general manager of said alleged corporation, said Barnard and Nestlerode being authorized to so act by the records of said alleged corpora-

tion, when they so executed, in the name of said corporation, the note sued upon in this case, then, if the jury so find from the evidence, they will find the issues for the plaintiff, and such sum as they find from the evidence is due and unpaid upon the note offered in evidence, together with interest at the rate of six per cent per annum, after maturity."

2. "The court instructs the jury that, if they find from the evidence that at the time when the note was given, it was given in settlement of a book account of the Thompson & Edwards Fertilizer Company, with the plaintiff, such fact will not impeach the consideration of said note; but, if the jury further find that the note was issued in the ordinary course of business of said corporation, and find from the evidence that the charter of said company has never been recorded in the recorder's office of Cook county; and, if the jury further find from the evidence, that at the time when said note was executed, the defendants Henry W. Hoyt and Henry J. Edwards were directors, then they will find against the defendants and in favor of the plaintiff."

3. "The court instructs the jury that, if they find from the evidence that F. E. Barnard, as secretary and treasurer, and A. L. Nestlerode, as general manager of the Thompson & Edwards Fertilizer Company, were authorized by a resolution of that company to execute note of said company; and if the jury further find from the evidence that the charter of the Thompson & Edwards Fertilizer Company was not at that time filed for record in the recorder's office of the county of Cook and State of Illinois, and, if the jury further find from the evidence that at the time said note was given, the defendants Henry W. Hoyt and Henry J. Edwards were, with others, directors of said company, then the jury are instructed to find for the plaintiff and assess the plaintiff's damages at the amount due upon said note, together with interest at six per cent after maturity."

4. "The court instructs the jury, as a matter of law, that the Revised Statutes of the State of Illinois require that when any instrument in writing is recorded in the recorder's office, the recorder shall indorse upon such instrument a certificate of the time (including the hour of the day) when the same was filed for record (which shall be considered the time of recording the same); and if the jury find from the evidence that the charter offered in evidence has not indorsed upon it such certificate, and, if the jury further find from the evidence at the time when the note was

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given, it was given in settlement of a book account of the Thompson & Edwards Fertilizer Company with the plaintiff, and that said note was issued in the ordinary course of business of said corporation, at the time it bears date, and the jury further find from the evidence that at the time said note was executed, the defendants Henry W. Hoyt and Henry J. Edwards were directors of said corporation, then the jury will find the issues in favor of the plaintiff and against the defendant."

It is apparent, from inspection of these instructions, that the question whether the note was given and received in payment of the company's indebtedness to appellee was excluded from the consideration of the jury. By the first instruction the verdict is made to depend upon the non-recording of the final certificate in the office of the recorder of deeds of Cook county, and the fact that Barnard and Nestlerode were the acting and authorized secretary and treasurer and general manager of the company when they executed the note, and that appellants Hoyt and Edwards were, at said time, directors. The jury are instructed that, if they find these facts, they will find the issues for the plaintiff. This instruction plainly excludes from the jury's consideration all question as to whether there was an agreement that the note should operate as payment.

Instructions 2, 3 and 4, equally exclude that question from the jury, by authorizing a verdict on proof of other facts.

Instruction 2 authorizes a verdict for appellee, on a finding by the jury that the note was given in settlement of a book account of the company; that it was issued in the ordinary course of business of the company; that the charter has not been recorded, and that, when the note was executed, Hoyt and Edwards were directors.

The instruction assumes that if the note was executed in the ordinary course of business, even though it may have been so executed in consideration of prior indebtedness binding on the company, and without any agreement that it should operate as payment, its execution would be illegal, and if appellants were directors at the time of its execu-

tion, the mere fact that they were such, without proof that either of them participated in any way in making or creating the indebtedness for which the note was given, would make them liable. Such is not the law. To execute a note for indebtedness previously incurred is not to make a debt or liability within the meaning of section 18 of the statute. The language of the section is, "then they shall be jointly and severally liable for all debts and liabilities made by them." Appellee's counsel contend that the section is purely remedial, and must be so construed, but the Supreme Court has held that section 16 of the act, which makes directors assenting to indebtedness of a corporation in excess of the amount of its capital stock liable for such excess, should be construed strictly (*Lewis v. Montgomery, supra*), and the Supreme Court of the United States, in *Huntington v. Attsill*, 146 U. S. 687, while holding a similar statute not strictly penal, say: "As the statute imposes a burdensome liability on the officers for their wrongful acts, it may well be considered penal in the sense that it should be strictly construed." *Ib.* 676. In the last case (p. 667), and also in *Diversey v. Smith*, 103 Ill. 378, 390, it is held that a penal law may also be remedial.

The reasoning by which the conclusion is reached that section 16 should be construed strictly, is equally applicable to section 18, and applying that construction to the latter section, "The words employed should be interpreted according to their plain and obvious meaning, and should not be extended by construction so as to embrace cases not clearly within the terms of the statute." *Lewis v. Montgomery, supra*. By the terms of the statute, liability is imposed on those only by whom the debts or liabilities were made.

We think it too clear to require argument, that the execution by a corporation of a promissory note, for indebtedness long previously incurred, is not the making of or incurring liability for the indebtedness evidenced by the note. The giving of the note is merely a recognition of the validity of the previously incurred indebtedness of the corporation; and a promise to do that which the corporation is

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legally bound to do, viz., pay it. In *Lewis v. Montgomery, supra*, it was held, in respect to section 16, that to make the directors liable, it must appear that they assented to the creation of indebtedness in excess of the amount of the capital stock, and the court, after so holding, said :

“Manifestly, a recognition of the indebtedness by the directors after it has been so contracted as to become binding upon the corporation, should not have the effect of charging them with this statutory liability. After the indebtedness has been created by such agents and in such manner as to constitute it a valid obligation of the corporation, it becomes the duty of the directors to recognize its validity, and, so far as in their power, provide for its payment.”

This language is equally applicable to section 18. Instruction 2 is also erroneous in assuming that appellants would be liable for the wrongful act of another officer or agent of the corporation, solely on the ground that they were directors at the time the act was performed. This view is expressly repudiated in *Lewis v. Montgomery, supra*.

We can not approve of a single instruction given for the appellee, our opinion being that they are all erroneous. The only other instruction given was a modification of an instruction asked by appellant Edwards, and related solely to the necessity of proof of appellee's case by a preponderance of the evidence.

Counsel for appellant, at the close of the plaintiff's evidence, requested the court to instruct the jury to find the issues for the defendant Hoyt, and presented to the court a written instruction so directing the jury, which instruction the court refused to give. Appellant Hoyt asked for no other instruction. We are of opinion that the instruction asked by appellant Hoyt at the close of all the evidence should have been given.

The judgment will be reversed and the cause remanded.

Mabel T. Rickert v. Joseph W. Suddard and Arthur S. Welch, Receivers.

1. BUILDING AND LOAN ASSOCIATIONS—*What is a Perfected Withdrawal.*—A perfected *bona fide* withdrawal from a building and loan association, with payment to the shareholder of the amount allowed him, puts an end to the membership and to all rights and liabilities of member and association in relation to each other.

2. SAME—*Effect of Notice of Withdrawal—Insolvent Associations.*—Notice of withdrawal from an insolvent association does not entitle a member to priority of payment over fellow-members. A member who has given notice of withdrawal from such an association, can not, if the association is found to have been insolvent when the notice was given, be permitted to receive any more than his just proportion of assets, and must share losses with other members.

3. SAME—*Checks Given in Payment of Withdrawals.*—Where a member gives notice of his withdrawal and is paid by a check upon the funds of the association in bank, but before such check is presented for payment the funds of the association are withdrawn and the association itself becomes insolvent, the rights of the holder of the check are to be determined by the solvency of the association at the time that the check was given.

4. SAME—*Insolvency of, How Determined.*—The insolvency of a building and loan association is a question of fact to be determined the same as similar questions of fact arising in other cases.

Intervening Petition.—Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Hearing and decree; appeal by petitioners. Heard in this court at the October term, 1898. Affirmed. Opinion filed February 9, 1899.

Appellant was a stockholder in the Mechanics & Traders Savings, Loan and Building Association, holding five shares in the forty-sixth series, issued January 18, 1887, and five shares in the sixty-fourth series, issued July 6, 1891. In October, 1896, she gave notice of withdrawal for the stock in the sixty-fourth series; on February 15, 1897, the board of directors declared the stock in the forty-sixth series matured; and on June 22, 1897, she assigned and delivered all of her stock to the association, which was canceled, and in payment therefor was given a check for \$717.70 on the

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American Exchange National Bank of Chicago. On July 27, 1897, Jacob Ruble and others filed a bill in the Circuit Court of Cook County against this association, alleging acts of mismanagement on the part of its officers, praying for an investigation, a receiver, etc. On July 31st, four days afterward, the State Auditor appointed a custodian for the association, who immediately took possession of its assets and withdrew the money on deposit, over \$4,000, out of the bank. On August 7th appellant's check was presented for payment at the American Exchange National Bank, but payment was refused because no funds of the drawer were then on deposit. On August 13th, the people, on the relation of the State Auditor, filed a bill in the Circuit Court of Cook County against the association, whereupon three receivers were appointed, and upon the order of the court the money in the hands of the custodian was paid over to the receivers. Having given notice to all parties in the suit and having obtained permission of the court, appellant filed an intervening petition in the cause on August 30th, claiming that \$717.70, then in the hands of the receivers, was her property and rightfully belonged to her by reason of the prior assignment thereof by the association, as evidenced by the check, and asking that the receivers be ordered to pay it over to her. The receivers answered that the check was given for stock canceled; that at the time the notice of withdrawal was given, and at the time part of the stock was declared matured, the association was insolvent; that petitioner was not paid in the order of giving withdrawal notice, and that therefore she occupied the position of a stockholder, notwithstanding the giving of the check. The petitioner (appellant) filed exceptions to that part of the answer which alleged insolvency and also to that part which alleged that petitioner was not paid in order of giving withdrawal notice, claiming those matters to be immaterial and impertinent. The court overruled the exceptions and petitioner filed a replication to said answer. The cause was referred to a master in chancery to take evidence and report with conclusions, upon the issues raised. On July 12, 1898, the cause came on to be

heard by the court upon the master's report and the exceptions of petitioner thereto, and the court found that petitioner continued to be a stockholder, notwithstanding the giving of the check and the surrender and cancellation of her stock; and that she was only entitled to her *pro rata* share of the assets of the association. From this decree the appeal here is prosecuted.

NORMAN H. CAMP, attorney for appellant.

The drawing and delivery of a check upon a fund deposited in a bank is in effect an assignment of such fund and operates precisely as if the money was, in fact, drawn out of the bank and paid to holder of the check. *Munn v. Burch*, 25 Ill. 36; *Brown v. Leckie*, 43 Ill. 500; *Union Nat. Bank v. Oceana Co. Bank*, 80 Ill. 212; *Bank of Am. v. Ind. Banking Co.*, 114 Ill. 483; *Abt v. Am. Trust & Savings Bank*, 159 Ill. 467; *Bank of Am. v. Bank of Ill.*, 164 Ill. 504; *National Safe & Lock Co. v. The People*, 50 Ill. App. 338.

A check is accepted as a particular form of cash payment. When given in payment and afterward paid it becomes a valid payment as of the date of its receipt. 18 Am. & Eng. Ency. of Law, 151, 174; 21 Am. & Eng. Ency. of Law, 638; Benjamin on Sales, Secs. 729, 730, 732; *Hunter v. Wetsell*, 17 Hun (N. Y.), 135; 84 N. Y. 549; *Henry v. Conley*, 48 Ark. 267; *Comptoir, etc., v. Dresbach*, 78 Cal. 15; *Mullins v. Brown*, 32 Kan. 312; *U. S. v. Thompson*, 33 Md. 575; *Good v. Singleton*, 39 Minn. 340; *P. & P. U. Ry. Co. v. Buckley*, 114 Ill. 337; *Ryan v. Dunlap*, 17 Ill. 43; 2 Greenleaf on Evidence, (15th Ed.), 519; *Strong v. King*, 35 Ill. 20; 2 Daniel on N. Paper, Sec. 1623; *Bailey v. Pardridge*, 134 Ill. 188.

A perfected withdrawal from a building and loan association followed by payment of the amount allowed puts an end to the membership and no further rights or liabilities on the part of either the association or the member exist. 4 Am. & Eng. Ency. of Law (2d Ed.), 1052; Endlich on Building Ass'ns Secs. 81, 82, 108; *Bowker v. Mill River Loan Ass'n*, 7 Allen (Mass.), 100; *Re West Riding of Yorkshire Society*, 45 Ch. D. 463; *Miller v. Jefferson Bldg. Ass'n*,

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50 Pa. St. 32; Priestly v. Hopwood, 12 W. R. 1031; S. C., 10 L. T. N. S. 646; Archer v. Harrison, 7 DeG., M. & G. 404; Jeffries v. Life Ins. Co., 22 Wall. (U. S.) 47-53; Booz's Appeal, 109 Pa. 592; Hoboken Bldg. Ass'n v. Martin, 13 N. J. Eq. 428; Christian's Appeal, 102 Pa. St. 184; McKinney v. Diamond Ass'n, 18 Atl. Rep. 905; In re Sheffield Permanent Bldg. Soc., 22 Q. B. Div. 470; Doughten v. Camden Bldg. Ass'n, 41 N. J. Eq. 556; In re Blackburn Soc., L. R. 6 Ch. 815; Anchor B. & L. Ass'n v. Blouse, 5 Penn. Dist. Rep. 321; Mutual B. & L. Ass'n v. Tascott, 143 Ill. 305.

As between the holder of a check and an assignee or receiver of an insolvent drawer, the former is entitled to the money. German Savings Inst. v. Adae, 8 Fed. Rep. 106; National Safe & Lock Co. v. The People, 50 Ill. App. 338; Abt v. Am. Tr. & Sav. Bank, 159 Ill. 467; 3 Am. & Eng. Ency. of Law (1st Ed.), 596, and cases there cited.

Upon giving notice of withdrawal a stockholder ceases *eo instanti* to be a member of the association and assumes the character of a creditor toward it. He is not liable for losses occurring after he withdraws. Endlich on Building Ass'ns, Secs. 110-136; Thompson on Bldg. Ass'ns, 128; U. S. Bldg. Ass'n v. Silverman, 85 Pa. St. 396; Nat. Bldg. Ass'n v. Hottenstein, 10 Pitts. L. J. 225.

When stock matures the holder has a right to have it paid in full. Endlich on Bldg. Ass'ns, Sec. 117; In re Mechanic's Ass'n, 7 Atl. Rep. (Pa.) 728; S. C., 6 Centr. Rep. 580.

The directors of an association have power to settle with its debtors and withdrawing members, and their acts are the acts of the association, binding it, in every particular, equally as if done by all its members. Endlich on Bldg. Ass'ns, Secs. 198, 199, 323, 418; State v. Oberlin Bldg. & L. Ass'n, 35 Oh. St. 258; 23 Am. & Eng. Ency. of Law, 676, 687.

In order to have escaped the entry of a judgment against it the defendant association would have had to allege and prove that the association was actually insolvent before the withdrawal notice was given; the burden of proof would

have been on the association. Endlich on Bldg. Ass'ns, Sec. 111; U. S. Bldg. Ass'n v. Silverman, 85 Pa. 394-398; National Bldg. Ass'n v. Hottenstein, 10 Pitts. Leg. J. (Pa.), 225; 2 Am. & Eng. Ency. of Law (1st Ed.), 649-651; Greenleaf on Evidence, Secs. 74-78.

The appointment of a receiver does not in any way affect the legal title to property. He stands indifferent between the parties, is the agent of neither, and can interpose no other defense than that which the party over whom he is appointed could have done. 20 Am. & Eng. Ency. of Law, pages 11, 13, 126, 130, 137, 252; Honegger v. Wettstein, 94 N. Y. 252; High on Receivers, Secs. 1 and 2.

In determining whether an association or an individual is insolvent, fair valuations must be put upon their property and not cash values to be derived at forced sales. National Bankruptcy Law, Sec. 1 (15); Dodge v. Mastin, 17 Fed. Rep. 660; 14 Am. & Eng. Ency. of Law, 468; Lawrence v. Boston, 119 Mass. 126; Somerville & E. R. Co. v. Dougherty, 22 N. J. L. 495.

The doctrine that a check operates as an equitable assignment is based upon the theory that the money is to be paid out of a specific fund, and the implied contract between the depositor and the bank that the depositor may appropriate portions of the fund by giving checks. In this case, the money having been withdrawn from the bank and become a part of the assets of the association prior to the presentation of the check, there was no specific fund upon which the check could operate, and it amounted to nothing more than a check by the association upon itself, which would not assign to the holder of the check any portion of the assets of the association. Commonwealth v. American Life Ins. Co. (Penn.), 29 Atl. Rep. 660.

Even if it should be held that the giving of the check constituted an assignment of the funds in a bank, even after the association, by its receivers, repossessed itself of the fund, the most that could be claimed would be that the association and its receivers took so much money belonging to the appellant in trust for her. This money went back into,

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became mingled with and constituted a part of the insolvent estate, and the appellant, not having identified any specific portion of the estate as belonging to her, will simply occupy the position of any other creditor or stockholder. *Bayor v. American Trust & Savings Bank*, 157 Ill. 62; *Lantermann v. Travous*, 73 Ill. App. 670; *Union Nat'l Bank v. Goetz*, 138 Ill. 127; *Wetherell v. O'Brien*, 140 Ill. 146; *Ill. Trust & Savings Bank v. First Nat'l Bank*, 15 Fed. Rep. 858; *Commercial Nat'l Bank v. Armstrong*, 39 Fed. Rep. 684.

If the appellant in this case is paid the amount of her check the payment must be made out of the assets of the insolvent estate in the hands of the receivers. Assets of an insolvent building and loan association must be distributed upon equitable principles, and unless the money has been actually paid out by the association prior to the appointment of receivers, a stockholder, in whatever form his obligation may have been merged, still remains a claimant upon the ground of stock interest, and must bear his losses with the other shareholders. *Chapman v. Young*, 65 Ill. App. 131; *Criswell's Appeal*, 100 Penn. St. 488; *Mechanics & W. B. & L. Ass'n v. Swartz*, 5 Penn. Dist. Rep. 318; *Archer B. & L. Ass'n v. Blouse*, 5 Penn. Dist. Rep. 321; *Commonwealth v. Am. Life Ins. Co. (Penn.)* 29 Atl. Rep. 660.

A person who has given notice of withdrawal from a building association can not, if said association is found to be insolvent, receive any more than his just proportion of the assets, and must share his losses with the other shareholders. *Chapman v. Young*, 65 Ill. App. 131; *Hohenshell v. Home S. & L. Ass'n (Mo.)*, 41 S. W. Rep. 948; *Rabbitt v. Wilcoxsen (Ia.)*, 72 N. W. Rep. 306; *Gibson v. Safety Loan & Homestead Ass'n*, 170 Ill. 44; *Vincent v. Harrison B. & D. Co.*, 5 Ohio N. P. 273; *Christian's Appeal*, 102 Pa. St. 184.

Neither holders of stock which has been declared matured or stock which is fully paid up, and payable on demand, are entitled to any preference in the distribution of the assets of an insolvent building association. *Post v. Mechanics B. & L. Ass'n*, 97 Tenn. 408; 37 S. W. Rep. 216; *Criswell's Appeal*, 100 Penn. St. 488; *Hohenshell v. Home S. & L.*

Ass'n (Mo.), 41 S. W. Rep. 948; Gibson v. Safety L. & H. Ass'n, 170 Ill. 44; Towle v. American B. & L. Ass'n, 75 Fed. Rep. 938.

A receiver of a building association represents not the corporate entity but the shareholders, and the estate must be collected and distributed, not according to the rules governing a building association as a corporate entity, but upon principles of equity. Chapman v. Young, 65 Ill. App. 131; Curtis v. Granite State Provident Ass'n (Conn.), 36 Atl. Rep. 1023; Towle v. Am. B. & L. Ass'n, 75 Fed. Rep. 938; Eversmann v. Schmitt (O.), 41 N. E. Rep. 139.

PAM, DONNELLY & GLENNON, attorneys for appellees, contended that the final decree finding the association to be insolvent is binding upon the petitioner in this case for two reasons:

First. A decree finding a building association to be insolvent is binding upon all the stockholders, whether made parties or not. Eversmann v. Schmitt (O.), 41 N. E. Rep. 139; Curtis v. Granite State Prov. Ass'n (Conn.), 36 Atl. Rep. 1023.

Second. Because the appellant entered her appearance in the case and was in court and a party to all the proceedings in the case where said decree was entered, and bound thereby. Frank v. Wedderin, 68 Fed. Rep. 818; Riley v. 1st Nat. Bank, 31 Atl. Rep. 585; Nelson v. Jenks, 52 N. W. Rep. 1081.

Withdrawing shareholders of a building and loan association must be paid in the order in which their notices of withdrawal are filed. Hoyt v. Inter Ocean Bldg. Ass'n, 58 Minn. 345; Batten v. City Bldg. Socy., 72 L. T., 87; Ward v. North Fairmount B. & L. Co., 5 Oh. N. P. 133.

MR. JUSTICE SEARS delivered the opinion of the court.

It is conceded in the arguments of counsel that a perfected *bona fide* withdrawal from a building and loan association, with payment to the shareholder of the amount allowed him, puts an end to the membership and to all rights

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and liabilities of member and association in relation to each other. Endlich on Building Associations, Secs. 82, 108.

It is also conceded that notice of withdrawal from an insolvent association does not entitle a member to priority of payment over fellow-shareholders. A member who has given notice of withdrawal from such an association, can not, if the association is found to have been insolvent when the notice was given, be permitted to receive any more than his just proportion of assets, and must share losses with other shareholders. *Gibson v. Safety L. & H. Ass'n*, 170 Ill. 44; *Chapman v. Young*, 65 Ill. App. 131; *Canadian Bldg. Ass'n v. Quimby*, 79 Ill. App. 105.

It is, however, questioned in the arguments of counsel, whether the evidence here warrants a conclusion that this association was insolvent in October, 1896, when the withdrawal notice was given by appellant.

This appeal lies from a decree upon an intervening petition. A decree entered in the cause in which this petition was filed upon December 22, 1897, finds that on July 1, 1897, the association was insolvent, and that its liabilities exceeded its assets by the sum of \$284,000. Upon the hearing of the issues raised by this petition, evidence was produced to show that the association was also insolvent in October, 1896. E. A. Gore testified that he was experienced in examining into the condition of building and loan associations; that he had examined the condition of this association; that there were other withdrawal notices given prior to that of appellant; that one of such withdrawing shareholders had not been paid when it was sought to pay appellant; that he ascertained the true condition of the association on September 20, 1897; that it was insolvent at that date and also on June 22, 1897, and that the deficit at such times amounted to \$284,000; that in October, 1896, the association was insolvent, and that its condition was then better only to the extent of \$40,000 than in September, 1897. This witness stated that in forming his opinion he had considered the cost of the real estate owned by the association, and also reports of expert appraisers. The witness was

not wholly consistent as to his knowledge of real estate values. At one time he testified that he was not "a real estate man," and was ignorant of real estate values. At another time, later in his examination, he testified that he could very closely determine the value of such property by knowledge of its location, which is substantially all that a real estate expert can do.

Against this testimony, unsatisfactory as it is, nothing whatever was offered. It appeared by the decree that the association was largely insolvent in July, 1897, and it appeared from the testimony that its condition was not better, except to the extent of \$40,000, in October, 1896.

We think it clearly determinable from all the evidence, that the association was insolvent to the extent of a deficit of at least \$244,000 in October, 1896, when appellant's notice of withdrawal was given, and in February, 1897, when the stock of the forty-sixth series was declared matured.

It is claimed that payment here has been fully made by the giving of the check, and that such payment controls. We think not. Whatever might be said of the right of appellant ordinarily, as against the drawer of the check, to the fund upon which it was drawn, yet it remains a fact that the check, given on account of a supposed obligation, which obligation did not equitably exist, was not presented while funds were in bank, and has not yet been paid, nor has the supposed obligation been satisfied. In this suit upon the intervening petition here, such payment of the supposed obligation is, in effect, sought to be enforced.

In *Chapman v. Young*, *supra*, it was held that although the shareholder seeking to withdraw had obtained judgment against the association, yet upon it being determined that the association was insolvent when his withdrawal notice was given, the collection of such judgment would be controlled by a court of equity, and that the character of his claim was not altered by the fact of obtaining judgment.

In this case, in view of the insolvency of the association when the notice of withdrawal was given, and when the check was drawn, we hold that a payment should not in

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equity be permitted. Having reached this conclusion, we find it unnecessary to consider other questions raised, except one, viz., as to the fees of the master in chancery. It is claimed by the appellant that the fees of the master in chancery are too large, and that the court below has failed to pass upon the propriety of them. We are unable, from this record, to determine whether they are proper. The decision here, affirming the decree, is made without prejudice to the rights of appellant to have a motion to fix the amount of the master's fees hereafter considered by the trial court. The decree is affirmed.

**Knights Templars and Masons' Life Indemnity Co. v.
Samuel E. Moore, Trustee, for the use of
Carrie I. Parish et al.**

1. **INSTRUCTIONS—When Erroneous.**—Where, by an instruction, the jury are told that the plaintiff claims that he is entitled to recover three several items or amounts, and if they find for the plaintiff their verdict will be for a sum equivalent to that claimed in all three items, while both parties agree that plaintiff is entitled to recover on one of the three items, the instruction is erroneous and is not cured by other instructions.

2. **SAME—Construction of General Rule.**—As a general rule all the instructions given in a case are to be construed together as one charge.

3. **SAME—Sufficiency of.**—It is usually sufficient if the instructions, when considered as a whole, present the law of the case fairly to the jury.

4. **SAME—Exception to the General Rule.**—As an exception to the general rule, it is stated that in a close case, the instructions should all state the law accurately. The jury, not being judges of the law, are as likely to follow a bad instruction as a good one.

Action upon Insurance Policy.—Trial in the Circuit Court of Cook County: the Hon. ABNER SMITH, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the March term, 1898. Reversed and remanded. Opinion filed February 14, 1899.

H. W. WOLSELEY, attorney for appellant.

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We submit that this record presents a case peculiarly calling for the application of the rule laid down by this court in *C. S. F. & C. Ry. Co. v. Bentz*, 38 Ill. App. 485:

"The rule is well established that in a case close in its facts, the instructions should all state the law accurately. The jury not being judges of the law, are as likely to follow a bad instruction as a good one."

This rule has abundant authority to support it. *T., St. L. & K. C. R. R. Co. v. Cline*, 135 Ill. 43; *C. & N. W. Ry. Co. v. Dimick*, 96 Ill. 47; *S. L., etc., R. Co. v. Walker*, 39 Ill. App. 388; *City of Peoria v. Simpson*, 110 Ill. 294; *Kelley v. L. & N. R. R. Co.*, 49 Ill. App. 304; *C. & W. R. Co. v. White*, 26 Id. 586.

ASHCRAFT & GORDON, attorneys for appellee.

The instructions should be regarded as one charge and should be construed together. *C., C., C. & St. L. Railway Co. v. Monaghan*, 140 Ill. 474.

In determining whether instructions are correct, all of the instructions should be construed together. *Cowen v. People*, 14 Ill. 348; *Lawrence v. Hagerman*, 56 Ill. 68.

Where all the instructions taken together properly present the law of the case, they are sufficient, although one of them construed apart, might be regarded as inaccurate. *Walker v. Collier*, 37 Ill. 362; *Murphy v. People*, Id. 447; *Potter v. Potter*, 41 Ill. 80; *Gainey v. People*, 97 Ill. 270; *Ritzman v. People*, 110 Ill. 362.

MR. JUSTICE HORTON delivered the opinion of the court.

This is an action at law upon a policy of insurance issued by appellant upon the life of James A. Parish. The appellant is what is known as an assessment or membership company. The policy is for the sum of \$5,000.

The policy contained the following provision:

"In case of the self-destruction of the holder of this policy, whether voluntary or involuntary, sane or insane, * * * this policy shall become null and void, and the widow and heirs or devisees of said member shall have no claim for benefits on this company; provided that in case of

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the self-destruction or suicide of the holder of this policy, then this company shall pay to his widow, or heirs, or devisees, only such amount on this policy as the member therein paid to this company on this policy in assessments on the same without interest."

The issue was made by the pleas, and substantially the only defense was, that James A. Parish died by self-destruction, and, therefore, there could be no recovery upon the policy. Said Parish had paid \$22.75 in assessments. It is conceded, as stated in brief and argument for appellee as follows, viz.:

"Both parties agreed that plaintiff should recover the twenty-two dollars and seventy-five cents (\$22.75) in any event.

"The contest at the trial was, whether or not a recovery should be had for the five thousand dollars (\$5,000)."

On behalf of appellant it is contended that there being no contest as to the right of appellee to recover the amount paid by James A. Parish in assessments, it was error to give to the jury the first instruction given by the court at the instance of appellee. It is conceded by appellant's pleas, and was by the testimony offered by it shown, that the amount of such assessments is \$22.75. Said first instruction is as follows:

1. "The court instructs you as law in this case that the plaintiff seeks to recover under the terms of a contract of insurance upon the life of James A. Parish, in evidence, the sum of five thousand dollars (\$5,000) mentioned in said contract, and the further sum of twenty-two dollars and seventy-five cents (\$22.75), claimed to have been paid by said Parish as assessments upon said contract of insurance, and interest on the said amounts since April 20, 1895. And you are instructed that if you find for the plaintiff in this case, your verdict will be for the sum of five thousand twenty-two dollars and seventy-five cents (\$5,022.75), and interest on that amount at five per cent (5%) per annum from April 20, 1895."

By this instruction the jury is told that the plaintiff claims that he is entitled to recover three several items or amounts, viz.: (1), the \$5,000 named in the policy; (2), \$22.75 paid by James A. Parish as assessments; and (3),

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interest on the total amount of these two items from the date named. This part of the instruction tells the jury that appellant claimed he was entitled to recover each one of these three items. It does not thus far assume to give the jury any instruction further than to inform them what the different claims are which the jury must pass upon in arriving at a verdict.

The jury are then, by the remainder of this instruction, told that if they find for the plaintiff, their verdict must be for the sum of \$5,022.75 and interest thereon. That is equivalent to saying to the jury that if they find for plaintiff as to either the first or the second item, then they must find for him as to both the first and the second items and interest on both. The verdict of the jury is precisely as this instruction, as above interpreted and explained, directs.

It must be borne in mind, in considering whether this instruction was proper, that the real contest was whether James A. Parish died by self-destruction. Also, that it was conceded that plaintiff should recover the amount paid as assessments. The jury could not, under this instruction, do otherwise than just what they did do, *i. e.*, find in favor of plaintiff as to all three of the items named in said instruction.

On behalf of appellee it is contended that the defect in said instruction, if any there be, is cured by the instructions given at the instance of appellant.

As a general rule, all the instructions given in a case are to be construed together as one charge; also, it is usually sufficient if the instructions, when thus considered, present the law of the case fairly to the jury. (*Ritzman v. People*, 110 Ill. 362, 372.)

But as what may be considered, perhaps, an exception to the general rule, it is held that "The rule is well established, that in a case close in its facts, the instructions should *all* state the law accurately. The jury, not being judges of the law, are as likely to follow a bad instruction as a good one." *C., S. F. & C. Ry. Co. v. Bentz*, 38 Ill. App. 485, 489; *C. & N. W. Ry. Co. v. Dimick*, 96 Ill. 42, 48; *I. C. R. R. Co. v.*

Estate of John Wilson.

Maffit, 67 Ill. 431, 435; Davies v. Cobb, 11 Ill. App. 587, 590.

The case at bar is "close in its facts" upon the question of whether Parish died by self-destruction—and this is the only question as to which there was any contest. The giving of said first instruction was erroneous. Under the facts and circumstances of this case, such error is not cured by the giving of the other instructions.

The contention on behalf of appellant that the company is not liable for interest even though appellee should be entitled to judgment, is not sound. The policy provides that in case of liability thereon the company will pay at a time there specified, that is, within sixty days after notice of the death. If entitled to recover upon this policy, appellee is entitled to recover interest.

For the error indicated, the judgment of the Circuit Court must be reversed and the cause remanded. Reversed and remanded.

Estate of John Wilson, Deceased—Petition of Geo. W. Hall.

1. **CREDITORS—Administration of Estates—Who are Under Sec. 48, Chap. 3, R. S.**—A creditor within the meaning of the statute providing for the administration of estates, is one to whom a sum is due from, and to be paid out of, an estate "after allowing to him all just credits."

2. **SAME—Definition of Bouvier—Century Dictionary.**—A creditor is one who has a right to require the fulfillment of an obligation or contract. He is defined to be "one to whom a sum of money is due for any cause."

Probate Proceedings.—Trial in the Circuit Court of Cook County on appeal from an order of the Probate Court; the Hon. RICHARD S. TUTHILL, Judge, presiding. Application for letters of administration denied. Appeal by petitioner. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed February 14, 1899.

VALLETTE & HALL, attorneys for appellant.

CHYTRAUS & DENEEN and OSCAR W. BRECHER, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

It is stipulated and agreed by the parties hereto that John Wilson departed this life May 18, 1894, intestate, leaving no widow or heirs resident within the United States; that letters of administration of the estate of said Wilson were granted to the public administrator May 21, 1894, by the Probate Court of Cook County; that George W. Hall, the appellant, filed in said Probate Court his petition, as a creditor, to be appointed administrator of said estate May 28, 1894, and his amended petition therefor October 22, 1894; that said Probate Court, by its order entered November 21, 1894, revoked the letters of administration issued to the public administrator, and by the same order denied the prayer of the appellant to be appointed administrator, for the reason that he was not a creditor of the deceased John Wilson; that November 22, 1894, said Probate Court appointed the State Bank of Chicago administrator *de bonis non*; that appellant appealed from said order of November 21, 1894, denying the prayer of his petition, to the Circuit Court of Cook County; and that said Circuit Court found that said appellant was not a creditor of said deceased, and not entitled to letters of administration, and denied the prayer of his petition. Said Hall brought the cause to this court by appeal from the judgment of said Circuit Court.

It is also stipulated and agreed by the parties, that at the time of his death decedent was indebted to appellant in the sum of \$325.25, for legal services, and that appellant was at the same time indebted to deceased in the sum of \$545.15.

The principal question, and we might say the only question argued by appellant in this court, is whether upon said agreed state of facts he was a creditor of the deceased within the meaning of the statute of this State. If he was not such a creditor he had no right to claim to be appointed administrator.

A creditor, within the meaning of the statute referred to,

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being the statute providing for the administration of estates, is one to whom a sum is due from, and to be paid out of, an estate "after allowing all just credits."

Bouvier defines a creditor to be "he who has a right to require the fulfillment of an obligation or contract." If appellant was a creditor of decedent within the meaning of the statute, then he had the right to file a claim and have it allowed and paid out of the estate. Suppose appellant had applied to the Probate Court to have allowed to him, as a creditor, the sum of \$325.15, to be paid to him in due course of administration, and had, in his application to that court, also stated that he was at the same time indebted to the estate in the sum of \$545.15. Can it be seriously contended that in such a case it could be held that appellant was a creditor? We can not conceive of any theory upon which it could be so held.

In the Century Dictionary a creditor is defined to be "one to whom a sum of money is due for any cause." It can not be said, upon the agreed state of facts before us, that there was any sum of money due from said estate to appellant. If the statute had provided that a "debtor" instead of a "creditor" should be appointed administrator, the appellant has made a complete case entitling him to the appointment.

We see no necessity for considering this case further. The judgment of the Circuit Court affirming the finding of the Probate Court is affirmed.

John E. Phillips, Receiver, etc., v. Lewis W. Pitcher.

1. **LIMITATIONS—Unwritten Contracts.**—Actions on unwritten contracts, expressed or implied, must be commenced within five years next after the cause of action accrued.

2. **CHECKS—As a Cause of Action.**—In this suit the checks are not the evidence of indebtedness sued upon. The cause of action is the implied promise which the law raises, under facts alleged in the declaration, and as the action is not based on any written contract or evidence of indebtedness in writing, it is not enough that the evidence by which the action is supported is in writing.

8. PARTIES — *Who Must be Joined as Defendants.*—The plaintiff must join as parties defendant all who are jointly liable upon the contract, and if he does not, he can not recover against any.

Assumpsit, for moneys misappropriated. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Judgment for defendant on demurrer to plea of the statute of limitations. Appeal by plaintiff. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed February 14, 1899.

JOHN J. McCLELLAN and CHARLES C. SPENCER, attorneys for appellant.

It is not essential that all of the evidence sustaining the cause of action should be in writing to bring the case within the ten years statute. *Plumb v. Campbell*, 129 Ill. 101; *Memory v. Niepert*, 131 Ill. 629.

HENRY STEPHEN, attorney for appellee, contended that the action did not accrue within five years, and consequently is barred by the statute of limitations providing that "Actions on unwritten contracts, expressed or implied, and all civil actions, not otherwise provided for, shall be commenced within the next five years after the cause of action accrued." *Hurd, R. S. Ill. 83, Sec. 15.*

The plaintiff declares upon a *quasi*-contract, or in other words, one raised merely by operation of law, and not upon any written contract which would be within the statute providing that "Actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidence of indebtedness in writing, shall be commenced within ten years next after the cause of the action accrued."

A check is not a bill of exchange. *Merchants Bank v. State Bank*, 10 Wall. (U. S.) 604, 647; *Morse on Banking* (2d Ed.), 259.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is an action in which appellant seeks to recover money of the National Bank of Sumter, South Carolina, alleged to have been misappropriated by its former cashier, and used in buying and selling grain and other merchandise

Phillips v. Pitcher.

upon 'change, in Chicago, through a firm of brokers and commission merchants, of which appellee was a member. The declaration alleges that the cashier appropriated this money and converted it to his own use by means of checks payable to the order of said firm, and that the latter received said checks, indorsed them and obtained the money with knowledge of their fraudulent and unlawful issue, for the personal use and benefit of the said cashier.

To this declaration the appellee pleaded the five year statute of limitations, with other pleas which have been withdrawn or otherwise disposed of. Plaintiff's demurrer to the plea of the statute was overruled in the Superior Court, and electing to stand by his demurrer, final judgment was rendered against him, from which judgment he prosecutes this appeal. It is contended that the demurrer was erroneously overruled because, it is said, the cause of action set out in the declaration does not fall within the five years statute of limitations. That statute is as follows: "Actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property, or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within the next five years after the cause of action accrued." Rev. Stat., Chap. 83, Sec. 15.

The suit was not commenced within five years, and appellant urges that it was not necessary that it should have been, because, as he contends, the suit is based on the checks of the National Bank of Sumter, and the indorsement of appellee's firm thereon, and falls within the ten years statute of limitations, which is as follows: "Actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidences of indebtedness in writing, shall be commenced within ten years next after the cause of action accrued." Rev. Stat., Chap. 83, Sec. 16.

It is said that the checks are included in the provision, "other evidences of indebtedness in writing," and are also inland "bills of exchange."

But the checks are not the evidences of indebtedness sued upon. The cause of action would have been the same if, instead of using checks as a method of placing the money misappropriated in the hands of the brokers, the cashier had sent it by express, or had employed other methods of transmission. The checks are merely evidences of the amount so remitted and of the fact, as shown apparently by the indorsements, that the brokers received the money. They do not of themselves create any liability. So far as appears from them the money which the checks enabled the brokers to obtain might have been paid and received for a legitimate consideration, in settlement of honest indebtedness. They do not contain any promise by the payee and indorser to pay or repay the money.

The cause of action is the implied promise which it is claimed the law raises, under facts such as are alleged in the declaration, and it is not based on any written contract or evidence of indebtedness in writing. "It is not enough that the evidence by which the cause of action is supported is in writing." *Knight v. St. L. & I. M. & S. Ry. Co.*, 141 Ill. 110, 115.

The action is not based on the checks, nor are they "relied upon as the contract between the parties by which the rights of the respective parties should be governed or controlled." *Penn. Co. v. Chi., Mil. & St. P. Ry. Co.*, 144 Ill. 197, 203.

The demurrer to the plea setting up the five years statute of limitations was properly overruled.

It appears upon the face of the declaration that the defendant and one Edward A. Bigelow were partners at the time when the cause of action arose, and jointly liable. They should, therefore, have been joined as parties defendant.

"The rule is, the plaintiff must join as parties defendant all who are jointly liable upon the contract, and if he does not, he can not recover against any." *Sinsheimer v. Skinner Mfg. Co.*, 165 Ill. 116, 123.

The judgment of the Superior Court must be affirmed.

West Chicago St. R. R. Co. v. Charles Musa.

1. **INSTRUCTIONS—*As to Negligence—When Erroneous.***—An instruction which charges the jury that if they “should find from the evidence that the defendant has been guilty of negligence, and that such negligence caused the injury,” their verdict should be for the plaintiff, in case the latter was in the exercise of reasonable and ordinary care, is erroneous, as the plaintiff is entitled to recover only in case the defendant has been guilty of the negligence charged in the declaration, and not negligence in general, and the instruction should have been so restricted.

2. **ATTORNEYS—*Improper Remarks of Counsel.***—Allusions of counsel to wealth and poverty are improper and a subsequent withdrawal has no specific efficacy; while not reversible error in this case, its probable effect upon the amount of the verdict is entitled to consideration.

3. **DAMAGES—\$2,500 Held Excessive.**—Where an injured person is able to earn the same wages shoveling coal as he earned before as a scavenger, \$2,500 is excessive under the facts in the case.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed if remittitur is made, otherwise reversed and remanded. Opinion filed February 14, 1899.

ALEXANDER SULLIVAN, attorney for appellant; EDWARD J. McARDLE, of counsel.

The rules regarding instructions so far as they bear on this case are well settled. They must confine the plaintiff to the negligence charged. *C., B. & Q. R. Co. v. Levy*, 160 Ill. 385; *C. & A. R. R. Co. v. Mock, Adm'r*, 72 Ill. 141; *L. S. & M. S. R. R. Co. v. Probeck*, 33 Ill. App. 145; *C., B. & Q. R. R. Co. v. Wells*, 42 Ill. App. 26.

C. E. CRUIKSHANK, attorney for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is an action to recover damages for personal injuries. The negligence charged is that “the defendant carelessly operated its car, and struck with great force against” the

wagon which the plaintiff was driving, and that "plaintiff was thrown with great force and violence out of said wagon upon the ground."

The contention of the plaintiff is that he was driving in front of the car on the track upon which the latter was running.

The contention of the defendant is that the plaintiff was driving between the track and the street curbing, and that as the car approached him he suddenly pulled in toward the track, the car being so near that the motorman was unable to prevent the collision.

The plaintiff testifies that he was driving upon the track; that he "heard some one holler," and looked around; that he saw the car approaching and turned out of the track as quickly as he could; that before the hind wheel of his wagon could be gotten out of the way, the car struck with such force as to carry the wagon a long distance, tumble the whole "outfit," including the mules, into a ditch, and that the plaintiff was injured by being squeezed between the sideboards of his own wagon.

He says he was confined to his bed two months, and to the house four months. His arm is still somewhat stiff, and the evidence of one of the medical witnesses is that a "condition of atrophy of the muscle of the shoulder exists," and that "it will be some time, if he ever does recover the use of that joint," although he says he found no injury to the joint. The other physician says, "The joint seemed to be somewhat thickened." The injury was, in the opinion of the physician who attended him, a "fracture of the coracoid process of the scapula."

The evidence is contradictory as to whether the wagon was being driven on the track or outside of it when the car was approaching. But the undisputed evidence that it was the rear end of the wagon which was struck and shoved ahead, would perhaps tend to substantiate the testimony of the plaintiff that he was pulling out of the way when struck and was not turning "in on the track," as the motorman testifies he was when the car was ten feet away; and might very well justify the jury in so believing. If the jury

believed that the accident was occasioned by the failure of the motorman to check the speed of his car in time to allow the wagon to get out of the way, we can not say that under the evidence the plaintiff would not be entitled to recover.

If the jury were accurately instructed as to the law, no sufficient reason appears, we think, in this record to disturb a judgment in favor of the appellee.

The instructions, however, were not strictly accurate. The jury were instructed for the plaintiff that if they should "find from the evidence that the defendant has been guilty of negligence, and that such negligence caused the injury," their verdict should be for the plaintiff, in case the latter was in the exercise of reasonable and ordinary care.

The plaintiff is entitled to recover only in case the defendant has been guilty of the negligence charged in the declaration, not negligence in general, and the instruction should have been so restricted. *N. C. St. Ry. Co. v. Cotton*, 140 Ill. 486, 493; *C. B. & Q. R. R. Co. v. Levy*, 160 Ill. 385.

But there was no negligence charged in the declaration except that defendant carelessly operated its car as above stated, and no evidence offered as to any other negligence. There is no reason to conclude that the jury could have found defendant guilty of negligence other than that charged in the declaration, when none was in any way brought to their notice at the trial.

This error is not confined to the plaintiff's instruction. It is found in at least two of those given at the request of the defendant.

In the tenth of these instructions the language is "that the defendant or its servants were guilty of negligence, without which the injury in question would not have happened;" and in the twelfth the language is, "even if the jury believe from the evidence that the defendant was guilty of negligence, still if," etc.

It is evident, therefore, that the court and counsel on both sides had in mind only the negligence charged in the declaration. We find in the record no suggestion of any other.

The fifteenth instruction given at the request of the defendant, stated the law accurately in this respect. It told the jury that they could not consider the question of damages until they had first determined "whether the defendant was guilty of the negligence charged in the declaration."

Upon the whole case we are of the opinion that the jury were not misled by the inaccuracy complained of.

Objection is made to remarks of appellee's attorney in his address to the jury. The language used is certainly improper. It could be of no interest to any one but the attorney himself if he ever "swore," as he says he did, that he would "never refuse a case for a poor man." His client was entitled to recover, if at all, only upon the law and evidence, not because of poverty or wealth; and such allusions are apparently intended to influence the jury by improper considerations. Objection was made to the language referred to, and sustained by the trial court, whereupon plaintiff's counsel said he withdrew it. But the mischief is done when such statements are made, and the mere statement, "I withdraw it," has no special efficacy. It is not, perhaps, reversible error in this case, although its probable effect upon the amount of the verdict is entitled to consideration.

Objections were made by appellant's counsel to other remarks of the attorney for appellee, but the objection was not pressed upon the attention of the judge and no ruling was obtained thereon. Such objections are ineffectual. *N. C. St. R. R. Co. v. Shreve*, 171 Ill. 438, 441.

The contention that the verdict is somewhat excessive is, we think, well taken. Appellee was employed as a scavenger, earning \$1.50 a day when injured. He is now earning the same wages shoveling coal. His earning capacity is not, so far as appears from this evidence, diminished. Unless a remittitur of \$500 is entered within ten days from the filing of this opinion, the judgment of the Superior Court will be reversed and the cause remanded. If the remittitur is made the judgment will be affirmed for the balance, at appellee's costs.

Brinton v. Lafond.

Henry H. Brinton v. Jean E. Lafond.

1. **SHORT CAUSE CALENDAR—Insufficient Notice.**—Notice that a suit has been placed upon the short cause calendar, served upon the attorney who had appeared for a party in an inferior court, does not make the notice sufficient under the statute, where it is affirmatively shown that such party had no attorney in the case after it was appealed to the court above, and none had appeared for him.

Replevin.—Trial in the County Court of Cook County on appeal from a justice of the peace; the Hon. WALES W. WOOD, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court at the March term, 1898. Reversed and remanded. Opinion filed February 14, 1899.

RUFUS KING, attorney for appellant.

JEAN E. LAFOND, appellee, *pro se*.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

Appellee in this case recovered judgment before a justice of the peace against appellant, and the latter perfected an appeal to the County Court. There the case was placed upon the short cause calendar, and appellant not appearing, judgment was obtained against him in that court for a sum considerably larger than the judgment entered before the justice. A motion to set aside the judgment was denied, and the defendant appeals.

It is contended that this *ex parte* judgment was improperly obtained, because no notice was given, as required by statute, that the cause would be placed on the short cause calendar.

The statute provides: "Upon the plaintiff, his agent or attorney, in any suit at law pending in any court of record, filing an affidavit that he verily believes the trial of said suit will not occupy more than one hour's time, and upon ten days' previous notice to the defendant, his agent or attorney, said suit shall be placed by the clerk upon said short cause calendar."

The bill of exceptions shows that an affidavit as required by statute, and a notice to the attorney who had represented appellant before the justice, with an affidavit of its service by copy, was duly filed with the clerk of the County Court. That affidavit of service states that the affiant "served the above notice by leaving a copy of the same," and was duly sworn to. It appears, however, that the copy so left, while a complete copy in all other respects of the notice itself and of the affidavit that affiant believed the trial of said suit would not occupy more than one hour's time, failed to show a copy of the signature of the officer before whom it was verified.

The statute provides that a suit may be placed upon the short cause calendar "upon ten days previous notice." The notice in this case might, perhaps, have been sufficient if it had been served upon "the defendant, his agent or attorney." But it was not so served. The fact that it was served on the attorney who had appeared for appellant before the justice, does not make the service sufficient under the statute. It is affirmatively shown that appellant had no attorney in the case after it was appealed to the County Court, and none had appeared for him. In *Covill v. Phy*, 24 Ill. 37, it was held that attorneys who tried the cause below, were not authorized to appear in the Supreme Court without a new retainer for that purpose.

The statute requires notice "to the defendant, his agent or attorney." The affidavit shows service upon an attorney not employed in the case, and upon no one else. The case was not properly upon the short cause calendar for trial, and it appearing from the affidavit filed that appellant had a good and meritorious defense, the motion to set aside the judgment was improperly denied.

The judgment of the County Court is reversed and the cause remanded.

Arnold v. Kilchmann.

Adolph Arnold, Theodore Arnold, Herman Arnold and Benjamin F. Baker v. Albert Kilchmann.

1. **VERDICT—*May Be Changed by Jury Before Recorded.***—Before a verdict is recorded the jury may modify and change it, as it is the verdict which is recorded that is to stand.

2. **SAME—*Not Valid Until Pronounced and Recorded.***—The verdict is not regarded as valid and final until it is pronounced and recorded in open court.

3. **SAME—*Error to Set Aside, upon Inspection of an Unrecorded Verdict.***—It is error to set aside and vacate a recorded verdict and judgment thereon after the term has closed, simply upon an inspection of a paper on file purporting to be a verdict of a jury.

Assumpsit, to recover deposits. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court at the March term, 1898. Reversed and remanded, with directions. Opinion filed February 14, 1899.

ESCHENBERG & WHITFIELD and SAMSON & WILCOX, attorneys for appellants.

WALTHER & LANAGHEN, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

This suit was commenced in the Circuit Court against six defendants. The records of that court, under date of March 22, 1897, show that a verdict of a jury was rendered in said cause against two of said defendants, and under date of April 10, 1897, shows that a motion for a new trial in said cause was overruled and final judgment entered upon said verdict against said two defendants.

The transcript filed in this court states that there is on file in the office of the clerk of said court a paper purporting to be a verdict of a jury in said cause. This purported verdict is peculiar in form and phraseology, but perhaps it may be so construed as to make it a verdict against the six defendants.

By an order, entered of record November 3, 1897, said Circuit Court set aside and vacated said order of March 22, 1897, being the recorded verdict of the jury in said cause. By the same order said Circuit Court set aside and vacated said final judgment entered April 10, 1897. The record recites that said order and judgment were vacated and set aside upon an inspection by said Circuit Court of said paper purporting to be a verdict, and upon that only.

The same day (November 3, 1897) the Circuit Court entered another final judgment in said cause, this time against all the defendants, for the sum named in said paper verdict, viz., \$532.39, together with interest thereon from March 22, 1897, amounting to \$15.50, making in all the sum of \$547.89.

The four appellants, being the four defendants below who were not included in said first recorded verdict or in said original judgment, bring this case to this court by appeal.

No point is made in brief and argument as to the fact of adding interest to the amount named in the paper verdict and including the same in the final judgment.

Several terms of said court had intervened between the day of the entry of the first judgment and the day when that judgment was set aside and the second judgment entered.

The case of *Lambert v. Borden*, 10 Ill. App. 649, if followed, is conclusive upon the point that the recorded verdict must control. As is well said in *Goodwin v. Appleton*, 22 Maine, 453, 458, "Before a verdict is recorded the jury may vary from their first offer of their verdict, and the verdict which is recorded shall stand. The verdict is not regarded as valid and final until it is pronounced and recorded in open court." See also opinion in *Kirk v. Senzig*, 79 Ill. App. 251.

It was error to set aside and vacate the recorded verdict, and the judgment entered thereon several terms of the court afterward, simply upon an inspection of a paper on file purporting to be a verdict of a jury. It is not pretended that the order of November 3, 1897, is an amend-

Am. Vault, Safe & Lock Co. v. Springer.

ment of former record. It sets aside the prior judgment and recorded verdict, and enters another and different verdict and judgment.

The judgment entered by the Circuit Court November 3, 1897, is reversed, and said cause is remanded with directions to set aside the entire order entered in said cause November 3, 1897. There being no appeal from the judgment entered April 10, 1897, and no error assigned thereon, it is not before this court for consideration. Reversed and remanded with directions.

American Vault, Safe & Lock Co., F. A. Bigford, Interpleader, v. Warren Springer.

80	231
92	278
80	231
194	178

1. BILL OF EXCEPTIONS—*Sufficient Stipulation to Incorporate into the Record.*—The following stipulation is held sufficient: “It is hereby stipulated and agreed that the original bill of exceptions in the above entitled cause may go into the record to the Appellate Court, in lieu of a copy of the same.”

Attachment.—Interpleader. Trial in the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Verdict and judgment for plaintiff; error by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed February 23, 1899.

The judgment here reviewed was rendered upon trial of issues upon an interpleader by F. A. Bigford in an attachment suit brought by Warren Springer against the American Vault Safe & Lock Company. The American Vault Safe & Lock Company was defaulted for want of plea in the attachment suit, and judgment was rendered against it in favor of Springer for \$1,268.33. That judgment was reviewed upon writ of error in this court and the judgment was affirmed. Am. V. S. & L. Co. v. Springer, 73 Ill. App. 232.

On March 23, 1896, an interpleader was filed by Bigford. Issue was joined thereon, and upon trial by the court with

a jury, a verdict and judgment thereon resulted in favor of defendant in error. To review that judgment this writ of error is prosecuted.

PINNEY & ORR, attorneys for plaintiff in error F. A. Bigford.

W. N. GEMMILL, attorney for defendant in error.

MR. JUSTICE SEARS delivered the opinion of the court.

The judgment of this court in *Am. V. S. & L. Co. v. Springer*, reported in 73 Ill. App. 232, disposes of all questions here sought to be raised in relation to the procedure of the trial court leading up to the judgment in the original suit.

The only matters now open to consideration are such as pertain to the proceeding upon the interpleader.

In July, 1893, the American Vault Safe & Lock Company was largely indebted to Springer for rent. Springer was pressing the company for payment, and had declined to allow it further time. On July 29, 1893, the company made a bill of sale, by which it conveyed to F. A. Bigford all its stock of safes and other property contained in its store. Afterward Springer sued out an attachment, which was levied upon twenty-two safes and two desks, covered by the bill of sale. The attachment suit was determined in this court as above indicated. The interpleader sought to reach these safes and desks, claiming them under the bill of sale of July 29, 1893.

The question of fact presented is as to the validity of the bill of sale.

Without attempting to review all the evidence bearing upon this issue, it is sufficient to refer to a portion of it and to say that it all taken together establishes conclusively, as we view it, that the bill of sale was fraudulent. F. A. Bigford, to whom it was given, is a son of M. A. Bigford, who was in the employ of the American Vault Safe & Lock Company. F. A. Bigford had no financial resources what-

ever. He was employed in another house, in a different line of business, and was receiving a salary of five dollars per week. He never took any actual possession of the property. There was an attempt at formal and fictitious delivery of possession, by having the young man go to the store of the American Vault Safe & Lock Company, accept the bill of sale, for which he paid nothing, save by executing his note, and by pretending to place his father in charge. The business of the company was afterward conducted by the same agents as before, and the young man who had pretended to purchase had nothing in reality to do with its management.

F. A. Bigford said in his testimony: "I suppose it was a legal proceeding, turning the goods over to me; nobody told me it was. Mr. Underwood (an employe of the American Vault Safe & Lock Company) did not tell me to do that; he said, 'we will go through the stock, and I will *turn it over* to you.' I did not have any money nor any bank account. I hadn't any property." Ray, an employe of the American Vault Safe & Lock Company, testified: "Underwood turned over the bill of sale and walked around through the stock and turned to him (Bigford) and said, 'I wish to *turn over* this stock to you.'"

The note given by Bigford was credited by moneys received in course of business by the company, and after a time was surrendered and a new note given for the balance shown by the first note. Bigford testified as to the notes, "I gave a note signed by myself. No security. I don't remember how long it was to run. I am sure my father paid something. I did not see him pay it; the difference between \$1,080.66 and \$2,999.63 is what has been paid up to March, 1894; then I gave a new note. I signed it. I don't remember the date. Have paid nothing on it. Don't remember how long that note was to run." It is perfectly clear, from this and much other evidence in the record, that no money was ever in fact paid by Bigford upon the note, and that all credits upon the same were fictitious, or based upon moneys received by the company from its sales in course of business. The whole transaction was a fraud, and the jury could have found no other verdict.

It is scarcely worth while to notice at length alleged errors in procedure, for it is so apparent that substantial justice is done by the verdict and that no different verdict could have been allowed to stand, that no mere error in procedure would lead us to interfere with the result of the trial.

The evidence objected to, if improper to establish an agency, was proper for purposes of consideration.

We find no substantial error in the instructions, which could have operated to the prejudice of plaintiff in error.

Defendant in error has moved to strike the bill of exceptions from the record, and we have reserved that motion to the final disposition of the case. The motion must be denied. It is stipulated by the parties as follows:

"It is hereby stipulated and agreed that the original bill of exceptions in the above entitled cause may go into the record to the Appellate Court, in lieu of a copy of the same."

It is contended that the stipulation does not provide that the original bill of exceptions may be made a part of the transcript, but only that it may become part of the record. It is perfectly apparent that the intent of the parties was to incorporate the original bill in the transcript, with the making of which they had something to do, and not to make it a part of the record, with which they had nothing further to do. The stipulation is sufficient. *L. S. & M. S. Ry. v. Hessions*, 150 Ill. 546; *Daube v. Tennison*, 154 Ill. 210.

The motion to strike the bill of exceptions from the record is denied.

The judgment is affirmed.

Catharine McGuire, Patrick O'Toole and Cornelius Hickey v. James H. Gilbert, for the use of Kate McGuire, Adm'x.

1. **EXCEPTION—*Must Be Shown by the Abstract.***—It is the duty of plaintiffs in error to show by their abstract any error of the trial court of which they complain.

2. **APPELLATE COURT PRACTICE—*Failure to Preserve Exceptions.***—This court can not review the action of the trial court as to any of the evidence offered where parties fail to preserve an exception to the ruling of the court in refusing their offers.

Debt, upon replevin bond. Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Verdict and judgment for plaintiff. Error by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed February 23, 1899.

STATEMENT OF CASE.

Defendant in error (plaintiff below) on a hearing before the Circuit Court and a jury February 23, 1898, procured a verdict finding the issues for defendant in error, debt \$5,000 and damages \$2,030, the jury having been sworn to try the issues joined, etc., upon which verdict, after overruling a motion for new trial, the court rendered judgment in the usual form, from which plaintiffs in error (defendants below) prayed an appeal. Plaintiffs in error, before the jury was sworn, objected to going to trial, and assigned as a reason that the cause was not at issue, but the court overruled their objection. The record, as it then appeared, showed a demurrer of defendant in error to an amended plea filed April 24, 1897, pending. The abstract does not show what the plea was. The action was on a bond made by plaintiffs in error, conditioned to prosecute a certain replevin suit to effect and without delay, etc. During the trial, after the evidence of defendant in error, plaintiffs in error offered to introduce evidence as to the value of the property in question, and to prove an offer to return the property to the defendant in error, and evidence in support of their plea

filed April 24, 1897, which the court refused, but plaintiffs in error took no exception.

February 28, 1898, during the same term, plaintiffs in error being present, the court amended the record *nunc pro tunc* as of June 12, 1897, to conform to the facts as they were found to appear from the minutes of Judge Adams, who disposed of the demurrer to the amended plea filed April 24, 1897, so as to show that the demurrer to that plea was sustained on June 12, 1897, whereupon plaintiffs in error entered their motion to set aside said verdict and judgment, which was denied. On March 7, 1898, during the same term, on motion of defendant in error, the court, for inadvertence or error on the part of the clerk, set aside the said order and judgment of February 23, 1898, and substituted in lieu thereof the following order, to wit:

"This day comes the plaintiff, by his attorneys, and it appearing to the court that the plaintiff is entitled to a judgment for want of plea herein, wherefore the plaintiff ought to have, and recover of and from the defendants his debt and his damages sustained herein by reason of the premises, thereupon reference is had to a jury to ascertain the amount due and to assess the plaintiff's damages herein. It is ordered that a jury come, who being duly sworn well and truly to ascertain the amount due and to assess the plaintiff's damages herein according to the evidence, say:

"We, the jury, find the debt to be \$5,000, and assess the damages at \$2,030.

"Whereupon the defendants enter their motion for a new trial, which is overruled and denied by the court, and judgment entered against defendants for \$5,000, to be satisfied on payment of \$2,030, interest and costs.

"Thereupon the defendants, having entered their exceptions, pray an appeal from the judgment of this court to the Appellate Court in and for the First District of Illinois, which is allowed on their filing their bond and bill of exceptions within thirty days from this date."

On March 19, 1898, plaintiffs in error moved to set aside the order of March 7, 1898, and in support of such motion read affidavits to the effect that the attorneys of plaintiffs in error were not served with notice of the entry of the order of March 7, 1898, and that on February 23, 1898, the

McGuire v. Gilbert.

jury was in fact sworn to try the issues and assess the damages, and that the default of plaintiffs in error was not then entered.

The rules of the Circuit Court required notice to plaintiffs in error of any motion, except when they were in default.

ALBERT H. MEADS and M. H. HOEY, attorneys for plaintiffs in error.

MORAN, KRAUS & MAYER, attorneys for defendant in error.

The doctrine that the Appellate Court has no power to review an error complained of unless an exception has been properly entered at the trial is supported by an unbroken line of authorities, of which we cite the following: *Fries v. Fries*, 34 Ill. App. 143, where the court say, on page 145:

“But the bill of exceptions in this case shows no exception taken to the action of the court below, and without such exception we have no power to review the action of the Circuit Court.”

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Plaintiffs claim it was error, first, for the court to try the case when it was not at issue; second, to refuse plaintiffs' offer of evidence; third, in amending the record March 7, 1898, without notice to them; and, fourth, to render judgment for the amount of \$2,050 damages on the evidence.

As to the first contention, it is sufficient to say that according to the facts, which are not denied, the record at that time to the contrary, however, plaintiffs in error were before the court without any pleading; defendant in error was entitled to a default for want of plea, and while the proceeding of the court was irregular, we are unable to see in what respect plaintiffs in error were prejudiced by it, in view of their subsequent action.

Second. The abstract does not show what the plea of plaintiffs in error was, under which they offered to introduce evidence, and for all we can tell, the evidence offered to support the plea was improper under their plea. It is the duty of plaintiffs in error to show by their abstracts any error of the trial court of which they complain, as has been repeatedly held by this and the Supreme Court.

Moreover, plaintiffs in error failed to preserve an exception to the ruling of the court in refusing their offers. This being so, this court can not review the action of the trial court as to any of the evidence offered. It was too late to make the point on motion for new trial.

Third. While, under a strict construction, it may be said that under the rules plaintiffs' attorneys were entitled to notice of the court's order of March 7, 1898, they were in fact in default from the time the demurrer to their plea was sustained. The record fails to show but that plaintiffs in error themselves received notice of this motion and the entry of the order of this date. If they did, that was sufficient, and this court may presume that such was the fact.

Plaintiffs in error had notice of the amendment of the record made February 28, 1898, which corrected the record to show the fact that the demurrer to their plea was sustained June 12, 1897, and the amendment of the record March 7, 1898, unnecessary. The fact that the jury was sworn to try the issues on February 23, 1898, if it was a fact, could in no way have prejudiced plaintiffs in error. It is elementary that the court may amend its record during the term to conform to the facts, which was all that was done by the order of March 7, 1898. Plaintiffs in error moved to set aside this order, and had their hearing, and they can not now say they were deprived of any right, because they have had their day in court.

Fourth. An examination of the record shows it was sufficient to sustain the judgment for the damages awarded.

There being no substantial error in the record, the judgment is affirmed.

High Court of Ind. Order of Foresters v. Heath.

**High Court of the Independent Order of Foresters of
Illinois v. Cora Ford Heath.**

Appeal from the Superior Court of Cook County.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is a suit upon a certificate or policy of insurance. It is claimed that steps had been taken to suspend the deceased just before his death, but no competent evidence appeared showing what had been done to that end. The only question presented is as to the admissibility of a printed book or pamphlet purporting to be a copy of the by-laws, but not proved as provided in Sections 15 and 18, Chap. 51, R. S. Held properly ruled out. Affirmed. See the opinion filed February 14, 1899.

LAWRENCE P. BOYLE, attorney for appellant.

E. L. RINEHART, attorney for appellee.

City of Chicago v. Catharine Gilmore.

Appeal from the Superior Court of Cook County.

MR. JUSTICE HORTON delivered the opinion of the court.

In this case there is no assignment of errors written upon or attached to the record. The judgment of the Superior Court must, therefore, be affirmed.

See the opinion of this court in *King v. Machesney* (case No. 7721), filed herewith, and in *I. Rosin v. William Wilde*, 80 Ill. App. 58, filed January 24, 1899, for citation of authorities. Affirmed. See the opinion filed February 14, 1899.

MILES J. DEVINE and J. B. O'CONNELL, attorneys for appellant.

CHARLES W. DWIGHT and C. M. HARDY, attorneys for appellee.

Charles W. King v. John Machesney.

Appeal from the Superior Court of Cook County.

MR. JUSTICE HORTON delivered the opinion of the court.

In this case there is no assignment of errors written upon or attached to the record. The judgment of the Superior Court must, therefore, be affirmed.

See opinion of this court in *I. Rosin v. William Wilde*, 80 Ill. App. 58, where authorities are cited. Affirmed. Opinion filed February 14, 1899.

N. H. HANCHETTE, attorney for appellant.

HECKMAN, ELSDON & SHAW, attorneys for appellee.

Frank Hausadowski et al. v. Joseph Grossman et al.

Error to the Circuit Court of Cook County.

The only question involved in this case is a question of fact, viz., payment. Opinion filed February 9, 1899.

SOL. LEVISOHN and J. KENT GREEN, attorneys for plaintiffs in error.

C. A. WILLIAMS and C. L. MAHONY, attorneys for defendants in error.

William M. Butterworth v. George C. Pfeifer.

Error to the Circuit Court of Cook County.

The only errors relied on in this case are that the court overruled a motion for a new trial, supported by affidavit, the grounds of the motion being newly-discovered evidence, and that the verdict of the jury, which was sealed and left with an officer of the court, by agreement, was opened and read in the absence of the jury, and thereby plaintiff was deprived of opportunity to poll the jury. Held: The affidavit of newly-discovered evidence was defective in not

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stating what was expected to be proved, and the bill of exceptions showed that the sealed verdict was opened and read by consent of counsel. The judgment was affirmed. Opinion filed February 9, 1899.

JAMES A. FULLENWIDER, attorney for plaintiff in error.

IVES & MASON, attorneys for defendant in error.

West and South Towns St. R. R. Co. v. Edward B. McKey, Receiver, etc.

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80 529

Appeal from the Circuit Court of Cook County.

This case was affirmed because no exception to the entry of judgment appeared in the abstract, upon authority of *Gibler v. City of Mattoon*, 167 Ill. 18, and *R. R. Co. v. O'Keefe*, 154 Ill. 510, and other cases cited in opinion. Opinion filed February 9, 1899.

LYMAN M. PAINE, attorney for appellant.

NEWMAN, NORTHRUP & LEVINSON, attorneys for appellee.

Adolph G. Wiese v. Wirth, Gutman & Co.

Appeal from the Circuit Court of Cook County.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

The controversy is purely one of fact. The case was heard by the court, a jury having been waived. There being evidence to sustain the finding of the trial court upon the questions of fact, it will be presumed to have been correct. *Doyle v. Overby*, 75 Ill. App. 634; *Casey v. Vandeventer*, 76 Ill. App. 628. Affirmed. Opinion filed February 14, 1899.

HENRY C. RUSTON, attorney for appellant.

STEELE & ROBERTS, attorneys for appellees.

80	242
88	191
80	242
91	131

Estate of John C. Gould, Deceased, v. Mary C. Watson.

1. **COSTS—Rule upon Appellant to Pay Costs of Transcript and Appeal, is Proper.**—The order entered, which was in effect a rule upon appellant to pay the costs of the transcript and appeal in this case, was proper, and upon failure to comply therewith the court could dismiss the appeal.

2. **WRIT OF ERROR CORAM NOBIS ABOLISHED—Statutory Remedy.**—The writ of *coram nobis* was abolished by Sec. 67 of the Practice Act, and all errors in fact, committed in the proceedings of any court of record, and which by the common law could have been corrected by said writ, may now be corrected by the court in which the error was committed, upon motion in writing made at any time within five years after the rendition of final judgment in the case, upon reasonable notice, etc.

3. **CORAM NOBIS—Scope of the Writ.**—At common law, if a judgment in the King's Bench was erroneous in matter of fact only, and not in point of law, it could be reversed in the same court, by writ of error *coram nobis*, or *quæ coram nobis resident*; so called, from its being founded on the record and process, which are stated in the writ to remain in the court, etc.; as when the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict or interlocutory judgment; for error in fact is not the error of the judges, and it is not reversing their own judgment.

4. **JUDGMENT—Against Party Dead or under Legal Incapacity, Void at Common Law.**—The principle that a judgment could only be valid when given between persons capable of being parties to a suit, is applied at common law, whether the judgment be against one not existing, or against one under legal incapacity.

5. **ERROR IN FACT—What Could Not Be Assigned as.**—Nothing can be assigned for error in fact that appeared and was adjudged in the former suit.

6. **AMENDMENT OF RECORD—By the Court after the Term.**—Amendment by the court of its own record and judgment after the term, is limited to corrections in affirmance of the judgment of the past term.

Probate Proceedings.—Trial in the Circuit Court of Cook County on appeal from the Probate Court; the Hon. ABNER SMITH, Judge, presiding. Verdict for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed February 23, 1899.

This cause was pending in the Circuit Court upon appeal from the Probate Court. It would seem from the record that appellant here, who was also appellant in the court

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below, had appealed from an order of the Probate Court, but had failed to perfect her appeal by filing a transcript of the record of the Probate Court, and had not paid the costs of the appeal. Thereupon the appellee procured and filed the transcript, paid the costs, and upon motion in the Circuit Court, obtained the following order to be entered on January 4, 1898:

“It is ordered on motion of Cora I. Chadsey, that said Mary C. Watson, appellant, shall, on or before the 10th day of January, 1898, pay said appeal costs of seventeen dollars and fifty cents (\$17.50) to said Cora I. Chadsey or her attorney, or to the clerk of the court; and in default of such payment of said appeal costs, said Chadsey may have the right to move to dismiss said appeal and suit for want of payment of said appeal costs on January 12, 1898.”

Afterward, and on January 15, 1898, the suit was dismissed for failure of appellant to comply with this order.

No further order in the cause was entered at that term of the Circuit Court; but at the next February term a motion was entered to vacate the order and judgment of January 15, 1898. Upon this motion affidavits were filed showing tender to the clerk of the court of the amount required by the rule to be paid, and refusal by him to accept same; also a request by attorney for appellant to an employe of attorney for appellees, that he go with him to the court to there accept payment, which such employe declined to do. Upon this motion and showing, an order was entered by the Circuit Court on March 1, 1898, vacating the order of January 15, 1898, and reinstating the cause upon the docket of the Circuit Court.

On the 27th of April, 1898, another order was entered by the Circuit Court vacating the order of March 1, 1898.

From this last order appellant prosecutes the appeal here.

W. H. UTT and E. J. DAHMS, attorneys for appellant.

CONSIDER H. WILLETT, attorney for appellee.

After a term has expired a court has no discretion or authority at a subsequent term to set aside a judgment. *Cook v. Wood*, 24 Ill. 295.

This court has uniformly and in a number of cases held that after the expiration of the term of court at which the judgment has been rendered the same court that rendered the judgment has no supervisory power over it at a subsequent term, except to amend it in mere matter of form, on notice to the opposite party. *Lill v. Stookey*, 72 Ill. 495.

After the expiration of the term at which the new trial in ejectment has been awarded under the statute, the order for a new trial will become conclusive and the court will have no power to set aside such order, even though all the costs have not been paid. *Cook County v. Calumet, Chicago C. & D. Co.*, 131 Ill. 505.

A motion to set aside a judgment by default comes too late at a term subsequent to that at which the judgment was obtained. *Messervey v. Beckwith*, 41 Ill. 452; *Coursen v. Hixon*, 78 Ill. 339.

A material amendment of a decree at a subsequent term of court is unauthorized and erroneous. *Bryant v. Vix*, 83 Ill. 11.

It is a well settled rule that after a term has expired a court has no authority or discretion at a subsequent term to set aside a judgment or to amend it except in matters of form, and for the purpose of correcting clerical errors. *Ayer v. Chicago*, 149 Ill. 262.

MR. JUSTICE SEARS delivered the opinion of the court.

The first order entered, which was in effect a rule upon appellant to pay the costs of transcript and appeal, was proper, and upon failure to comply therewith the court could dismiss the appeal. *Meserve v. Delaney*, 112 Ill. 353.

There was here no actual compliance with the rule, but there appears to have been such attempt to comply therewith as would, had it been brought to the attention of the Circuit Court, have availed with the court against the entering of the order dismissing the appeal.

The question presented is whether, upon this state of fact, the Circuit Court had power, at the February term, to set aside and vacate its judgment of January 15, 1898, which

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was of the December, 1897, term. Appellant contends that there was such error in fact in the entering of the judgment of January 15th, as warranted the court in setting it aside after the expiration of the judgment term.

The common law writ of error *coram nobis* is abolished in this State, but in lieu thereof we have a statutory provision which substitutes a motion as a method of reaching the errors which were at common law reached by the writ. The statute, Sec. 67 of the Practice Act, is as follows:

“The writ of error *coram nobis* is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which by the common law could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing made at any time within five years after the rendition of final judgment in the case, upon reasonable notice,” etc.

But the error of the Circuit Court, if any there were, was not such as could be reached at common law by the writ of *coram nobis*.

The scope of the writ has been defined by text writers and courts, as follows:

“If a judgment in the King’s Bench be erroneous in matter of fact only, and not in point of law, it may be reversed in the same court, by writ of error *coram nobis*, or *quæ coram nobis resident*, so called from its being founded on the record and process, which are stated in the writ to remain in the court, etc.; as when the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict or interlocutory judgment; for error in fact is not the error of the judges, and it is not reversing their own judgment.” 2 Tidd’s Practice (3d Am. Ed.), 1136–7.

In *Birch v. Trist*, 8 East, 415, the court said:

“Before a writ of error *coram vobis*, it not being a writ of right, is allowed, there must be an affidavit of some error in fact, by which, in case the fact to be assigned for error is true, the plaintiff’s right of action will be destroyed,” citing *Ribout v. Wheeler*, Sayer, 166.

“A writ of error may be brought in the same court for an error in fact; thus, when an erroneous judgment is given in matters of fact only, and not in point of law, it may be

reversed in the same court by writ of error, which is sometimes called *coram vobis*, but more correctly, *coram nobis*; as where the defendant, being under age, appeared by attorney; or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict or interlocutory judgment. But if the error be in the judgment itself, and not in the process, a writ of error does not lie in the same court, but must be brought in another." *Jaques v. Cesar*, 2 Saunders, 100, note.

The Supreme Court of the United States, in *Picketts v. Legerwood*, 7 Peters, 147, defines the scope of the writ thus:

"The cases for error *coram vobis* are enumerated without any material variation in all the books of practice, and rest on the authority of the sages and fathers of the law. I will refer to the pages of Archibald for the following enumeration: 'error in the process, or through default of the clerk; error in fact, as when the defendant, being under age, sued by attorney, in any other action but ejectment; that either plaintiff or defendant was a married woman at the commencement of the suit, or died before verdict or interlocutory judgment, or the like.' But all the books concur in quoting the language of Rolle's Abridgment, p. 749, 'that if the error be in the judgment itself, and not in the process, a writ of error does not lie in the same court, but must be brought in another and superior court.'"

"From the presumption that a judgment could only be valid when given between persons capable of being parties to a suit, it was deduced as a consequence in the Roman law that a judgment against a party, who at the time of giving it was dead, was null. It is so likewise by the common law. The principle is applied, whether the judgment be against one not existing, or against one under legal incapacity. The matter not appearing on the record can not be assigned as error in law, on motion in arrest of judgment, or on a writ of error from a higher court. Yet it may in the same court be assigned as error in fact upon a writ of error *coram nobis* or *coram vobis*," etc. 7 Robinson's Practice, p. 157.

In *Crawford v. Williams*, 1 Swan. 341, the court said of this writ:

"It is true that nothing can be assigned for error in fact that appeared and was adjudged in the former suit, or

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which contradicts the record of that suit." Citing Bac. Ab., title "Error."

"The writ of error *coram nobis* is not intended to authorize any court to review and revise its opinions; but only to enable it to recall some adjudication, made while some fact existed, which, if before the court, would have prevented the rendition of the judgment, and which, without any fault or negligence of the party, was not presented to the court." Freeman on Judgments, Sec. 94.

It is apparent from these authorities that the fact upon which the error is predicated, in order to avail under this writ, must be matter not part of the issues tried by the court, but something *aliunde*, which, if presented to the court at the trial, would have absolutely precluded the judgment as rendered, and not a fact merely bearing upon the issues adjudged, however conclusive it might have been of such issues. It is at least questionable if the scope of the writ at common law, and hence of the motion, which is here a substitute for it, is not limited by well established practice to such cases as are enumerated in the text and decisions above quoted. But it is in any event quite clear that it has never had, in the practice of the common law, a scope wide enough to reach any error of fact, which was embraced in the conclusion of the court upon the issues of fact adjudged, whether error in passing upon facts submitted or an erroneous conclusion, because certain facts, which would have been conclusive of the issues, were not presented. The decisions in this State are in accord with the authorities cited, so far as the question has been considered, and certainly do not extend the limits suggested by these authorities. Sloo v. State Bank, 1 Scam. 428; Beaubien v. Hamilton, 3 Scam. 213; Lyon v. Boilvin, 2 Gil. 629; Peak v. Shasted, 21 Ill. 137; Cook v. Wood, 24 Ill. 295; McKindley v. Buck, 43 Ill. 488; Stoetzell v. Fullerton, 44 Ill. 108; Mains v. Cosner, 67 Ill. 536; Courson v. Hixon, 78 Ill. 339; Fix v. Quinn, 75 Ill. 232; Claffin v. Dunne, 129 Ill. 241.

The issue of fact presented to the Circuit Court, and upon which its judgment of January 15th was based, was

compliance or failure to comply with the rule to pay costs. The fact upon which error is here predicated is the fact of a tender of the costs, which bore directly upon the issues adjudicated. Such error could not have been reached under the common law practice by a writ of error *coram nobis*. Hence it can not be corrected after the term upon motion under our statute. The cases which are cited in the arguments in relation to the power of the court to amend its own record and judgment after the term, when there is something to amend by, are not in point. Such amendments are limited to corrections in affirmance of the judgment of the past term. *Jansen v. Grimshaw*, 125 Ill. 468; *Fielden v. People*, 128 Ill. 595; *Ayers v. Chicago*, 149 Ill. 262.

Here the attempt was, not to amend in affirmance of the judgment, but to vacate and set aside the final judgment of a prior term.

It is argued that the court had not jurisdiction to enter the order of January 15, 1898. There can be no question that the court had then jurisdiction both of the subject-matter and the parties. But the court had no power to enter the order of March 1, 1898, and that order was, therefore, wholly inoperative and void. There was no error in eliminating this void order from the record by the order of April 27, 1898. *Keeler v. People*, 160 Ill. 179.

The judgment is affirmed.

Fannie Lieserowitz, by her next friend, v. West Chicago St. R. R. Co.

1. **EQUITY PRACTICE**—*When Court of Equity Will Set Aside a Judgment.*—A court of equity will, in a proper case of fraud, or mistake, set aside a judgment; and when it does so it will, as preliminary and incidental relief, restrain by injunction all proceedings upon such judgment.

2. **SAME**—*Setting Aside Judgment in Equity — Remedy in Legal Forum.*—On setting aside a judgment obtained by fraud, or mistake, no equitable element existing in the original controversy, the adjudication of the original controversy on the merits is omitted, and the parties are left to pursue their remedy in the legal forum.

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s99	592
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80	248
s197s	609

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3. **EJECTMENT—*Legal Titles in Courts of Equity.***—It is contrary to all rules of proceeding to try an ejectment suit in a court of equity. In all cases in which the title of real estate is legal and not equitable, the remedy is ample and complete at law, and no necessity can exist requiring the chancellor to assume such jurisdiction.

4. **MINORS—*Can Not Consent to Waive a Jury.***—Where a party to an action at law is a minor, such party can not consent to the waiver of a trial by jury or to the entry of a judgment, nor can such minor be bound by any such waiver or consent by a next friend.

5. **NEW TRIALS—*In Equity.***—Ordinarily on an application to a court of equity to set aside a judgment obtained by fraud or mistake, it is not enough to prove the fraud or mistake; it must be made to appear that the complainant has merits on his side and that he has evidence which, if submitted to a jury, might produce a different result.

6. **SAME—*Object of the Inquiry Same as at Law—Merits.***—The object of an inquiry in relation to the merits in applications to courts of equity for new trials, is the same as on applications to courts of law, on the ground of newly-discovered evidence, not cumulative, viz., to determine the probability of a different result; but it is not necessary for this purpose that courts of equity should decide finally and conclusively on the merits.

7. **INSTRUCTIONS—*Harmless Error.***—Where an instruction states that unless the plaintiff has proven by a preponderance of the evidence that she did exercise a reasonable degree of care for her own safety, the jury should find for the defendant, but omits the time at which the care was required to be exercised, namely, at the time of the alleged injury, the error is not sufficient to warrant a reversal of the judgment.

8. **SAME—*Reversible Error.***—An instruction which tells the jury that if they believe from the evidence that any witness who has testified in the case has been successfully impeached, then they are at liberty to disregard all the evidence of such witness except in so far as it is corroborated by other credible evidence or by facts and circumstances as shown by the credible evidence in the case, is well calculated to prejudice the plaintiff, where she is the only witness for herself as to the manner of the accident, and will warrant reversal.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for defendant. Error by plaintiff. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed February 23, 1899.

MOSES, ROSENTHAL & KENNEDY, for plaintiff in error.

ALEXANDER SULLIVAN, attorney for appellee; EDWARD J. McARDLE, of counsel.

MR. JUSTICE ADAMS delivered the opinion of the court.

This was an action by plaintiff in error against defendant in error, by Louis Lieserowitz, her next friend. The declaration contains but one count, which, after alleging that the defendant owned and operated certain lines of street railway on State street, Randolph street and other streets in the city of Chicago, with cars thereon drawn by horses, proceeds as follows :

“Plaintiff with all care and diligence was upon one of said defendant’s cars on South Halsted street as a passenger to be safely carried to her place of destination. On said day plaintiff was with all care and diligence upon the car as a passenger, and was attempting to alight therefrom at the intersection of State street with Randolph street, having first requested the servant of the company to stop the car at said intersection to allow her to alight. The company by its servants negligently failed and neglected to stop the car a sufficient length of time to allow plaintiff to alight, but caused said car to be suddenly and violently started, by reason whereof plaintiff was thrown with great force and violence from and off said car, upon the ground, and was thereby greatly bruised and injured about her back, womb, and divers other parts of her body, and was otherwise greatly bruised and wounded, and became sick, sore and permanently injured, and remained so for a long space of time, hitherto, suffering great pain, being hindered and prevented from transacting her business affairs. Damages, \$1,000.”

The defendant pleaded the general issue and, by agreement of the parties, the cause was submitted to the court for trial, without a jury; the court found the defendant guilty and assessed the plaintiff’s damages at the sum of \$50, and judgment was entered on the finding and was satisfied in full in open court. Subsequently, Simon Lieserowitz, as the next friend of plaintiff, filed a bill in chancery in the Circuit Court, against defendant and Louis Lieserowitz, containing substantially the same averments in relation to plaintiff’s cause of action as are contained in her declaration, and alleging facts which, if true, tended to show fraud and collusion between Lieserowitz and defendant in procuring the judgment above mentioned. The prayer of the bill was as follows :

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“That a decree may be entered herein setting aside said judgment and declaring the same to be null and void and of no effect; that your orator may be permitted to institute an action for damages, as the next friend of said Fannie Lieserowitz, against the said West Chicago Street Railroad Company, so that her damages may be assessed, after a fair and impartial hearing thereof, in one of the courts of record of said Cook county, Illinois; that your orator may have such other and further relief in the premises as equity may require, and to your honors shall seem meet.”

The defendant answered the bill, denying all fraud and collusion in obtaining the judgment, and also denying all material allegations, except the ownership and operation of the railroad, which it would be incumbent on plaintiff to prove in order to recover in the common law suit, including the allegations of ordinary care on her part and negligence on the part of the defendant causing the alleged injury.

A replication was filed to defendant's answer, the bill was taken for confessed as against Louis Lieserowitz, and the cause was heard on the pleadings and proofs. The decree, after the usual preliminary recitals, contains the following:

“The court further finds that the material allegations of said bill of complaint are true, that the equities are with the complainant, and that the complainant is entitled to relief as therein prayed.” The decree sets aside the judgment and provides that after twenty days from the entry of the decree, a writ of injunction shall issue enjoining defendant from setting up the judgment as a defense to the action in which the judgment was rendered, or to any action which might be instituted by plaintiff, or in her behalf, against defendant, and enjoining Louis Lieserowitz from further acting as plaintiff's next friend in respect to her said claim.

On motion of plaintiff's attorneys and on presentation to the Superior Court of the decree of the Circuit Court, it was ordered that the cause be redocketed in its numerical order, and that Simon Lieserowitz be substituted for Louis Lieserowitz as plaintiff's next friend, and that all papers and proceedings be amended by increasing the *ad damnum* from \$1,000 to \$20,000. On a retrial of the cause on the same issues, the jury found the defendant not guilty, a motion for

a new trial was overruled, and judgment was entered on the verdict, to reverse which is the object of this appeal.

Plaintiff's counsel, on the trial, offered in evidence the pleadings and decree in the chancery case, claiming that the decree was conclusive as to the exercise of ordinary care by the plaintiff, and that the negligence of the defendant, as alleged in the declaration, caused the injury. The court excluded the evidence, and this is assigned as error. The object of the bill was not to obtain a final adjudication between the parties on the merits in chancery. Its sole object was to procure a decree setting aside the former judgment and enjoining the defendant from setting it up as a defense in the suit in the Superior Court, or in any suit which might be brought by the plaintiff for the same cause of action. In other words, the object of the bill was to remove the judgment out of the plaintiff's way, so that she might proceed in all respects as if it had never been rendered. This was the sole relief prayed and granted, and so it was understood by plaintiff's counsel, as is illustrated by their motion that the cause be redocketed, and the presentation of the decree to the Superior Court in support of that motion. When such a bill as that in question is filed, it is not in accordance with modern practice to give final relief on the merits, there being no equitable element in the original controversy between the parties, or involved in the suit at law in which the judgment was rendered. Pomeroy, in his work on equity, says: "A court of equity, in general, no longer assumes control over a legal judgment for the purpose of a new trial or any similar relief; it will in a proper case of fraud or mistake set aside such judgment; and whenever it will grant this final remedy, it will, as preliminary and incidental relief, restrain by injunction all proceedings upon the judgment." It has been the uniform practice in this State, on setting aside a judgment obtained by fraud or mistake, no equitable element existing in the original controversy, to omit an adjudication of the original controversy on the merits, and leave the parties to pursue their remedy in the legal forum. *Lincoln v. Cook*, 2 Scam.

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61; Wilday v. McConnel, 63 Ill. 278; McGehee v. Gold, 68 Ib. 215; Brown v. Luehrs, 79 Ib. 575; How et al. v. Mortell et al., 28 Ib. 478.

In the last case cited, *supra*, a judgment was recovered in ejectment in violation of an agreement between the parties, and neither the defendants, nor their attorney, had knowledge of the trial or judgment until eighteen months after the rendition of the judgment. A bill was filed to set aside the judgment; the cause was heard on bill, answer and replication, and a decree was rendered not only setting aside the judgment, but adjudicating as to the title and the legal rights of the parties. This last was held erroneous, the court saying:

“It is, however, urged that it was error in the court below, on the hearing of the bill, to proceed to settle the title and adjust the legal rights of the parties. There was nothing alleged in the bill showing that the defense to the ejectment suit was in equity. It is contrary to all the rules of proceeding to try an ejectment suit in a court of equity. In all cases in which the title is legal and not equitable, the remedy is ample and complete at law, and no necessity can exist requiring the chancellor to assume such jurisdiction. When the question of fraud or mistake was found to exist, and the judgment at law was set aside and a new trial granted, the impediment to proceeding at law was removed, and the jurisdiction of the chancellor was at an end. The court below, therefore, erred in proceeding to a trial and decree on the title.”

There is certainly no equitable element in plaintiff's claim for damages, as stated in her declaration, which would confer jurisdiction on a court of equity to finally adjudicate on the merits of the claim.

Plaintiff, being a minor, could not herself waive a jury and consent to a judgment. Railroad Co. v. Elder, 50 Ill. App. 276; 2 Pomeroy's Eq. Juris. 815; Daingerfield v. Smith, 1 S. E. Rep. 599.

Much less could she be bound by any waiver or consent of her next friend. Therefore, the judgment was not binding on her, and it would seem that mere proof of her minority, which was furnished by the record before the chancellor, would be sufficient to warrant a court of equity in setting

aside the judgment. Ordinarily it is true, as stated by plaintiff's counsel, that on application to a court of equity to set aside a judgment obtained by fraud or mistake, it is not enough to prove the fraud or mistake; it must appear that the complainant has merits on his side, but this is for the purpose of showing to the court that the complainant has evidence which should be submitted to a jury, and which, if so submitted, might produce a different result. Freeman on Judgments, 2d Ed., Sec. 498; Holmes v. Stateler, 57 Ill. 209, 214; Taggart v. Wood, 20 Iowa, 236.

The object of an inquiry in relation to the merits is precisely the same as on an application to a court of law for a new trial, on the ground of newly-discovered evidence, not cumulative, viz., to determine the probability of a different result, if the new evidence should be submitted to another jury. It is clearly not necessary for this purpose, that a court of chancery should decide finally and conclusively on the merits.

In Kitson v. Farwell, 137 Ill. 327, the court say: "The authorities are, therefore, that a judgment is conclusive only of what it necessarily and directly decides." In Smith's notes, the following, Doe v. Oliver and the Duchess of Kingston's case, 3 Smith's Leading Cases, 9th Am. Ed., p. 2014, this occurs:

"It is also necessary, as a general rule, that the earlier judgment which is set up in a plea of *res adjudicata* should have been intended to be a final decision between the parties. This rule is well illustrated by the modern case of Langmead v. Maple, 18 C. A. N. S., 255, where, to a declaration for an injury to the plaintiff's reversion by building upon his wall, the defendant pleaded that under the Chancery Regulation Act of 1867, the very same question had been determined against the plaintiff by the court of chancery and it was held to be a good replication that the court, in dismissing the plaintiff's bill, had reserved to him the right of proceeding at law in respect of the matters complained of."

In Langmead v. Maple, *supra*, it was expressly held that in order for the decree to be conclusive of the controversy between the parties, it must appear that there was a final

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adjudication on the merits. All that was asked by the bill in question, and all that was granted, and all that, on the authority of *How et al. v. Mortell et al.*, *supra*, the chancery court had jurisdiction to grant, was the removal of the judgment as an impediment to proceeding at law. The learned chancellor stopped where his jurisdiction ended, and did not erroneously proceed to a final adjudication of the legal controversy between the parties. The evidence was properly excluded.

Plaintiff's counsel object generally to all the defendant's instructions and specifically to some of them. Objection is made to instruction four, by which the jury are instructed, in substance, that unless the preponderance of the testimony showed that plaintiff fell by reason of the car being suddenly started, the verdict should be not guilty. The averment in the declaration is, that the company "caused said car to be suddenly and violently started, by reason whereof plaintiff was thrown with great force and violence from and off said car," etc., and counsel, in their argument, p. 17, say: "The plaintiff's claim was that she fell by reason of the sudden and violent starting of the car." We perceive no error in the instruction. Instruction five is as follows:

"The jury are instructed that while a minor is not required to exercise the same degree of care and prudence for his or her safety which is required of a person of mature age, yet he or she is required to exercise such ordinary care for his or her own safety as is commonly exercised by one of like years, experience and intelligence. Unless the plaintiff in this case has proven by a preponderance of the evidence that she did exercise such degree of care for her own safety, the jury should find for the defendant."

The only objection which we can perceive to this instruction is, that it omits the time at which the care was required to be exercised, namely, at the time of the alleged injury. We would not, however, deem this inaccuracy sufficient to warrant a reversal of the judgment.

Instruction nine: "The court instructs the jury that if they believe from the evidence that any witness who has

testified in the case has been successfully impeached, then the jury are at liberty to disregard all the evidence of such witness except in so far as it is corroborated by other credible evidence or by facts and circumstances as shown by the credible evidence in the case."

This instruction was held erroneous in *Kornazsewska v. W. C. St. R. R. Co.*, 76 Ill. App. 366. The instruction was well calculated to prejudice the plaintiff, as she was the only witness for herself as to the manner of the accident. We find no other substantial error in the instructions. On account of erroneous instruction nine, the judgment will be reversed and the cause remanded. Reversed and remanded.

William McGuigan, Jr., v. Alonzo Rolfe.

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104	201

1. WORDS AND PHRASES—"When a Cause of Action has Arisen."—The construction of the words "When a cause of action has arisen," as they occur in Chap. 83, Sec. 20, R. S. Ill., should be as meaning, when jurisdiction exists in the courts of a State to adjudicate between the parties upon the particular cause of action if properly invoked; or, in other words, when the plaintiff has the right to sue the defendant in the courts of the State, upon the particular cause of action, without regard to the place where the cause of action has its origin, is limited to cases where both parties reside out of this State when the action accrues, and continue to reside out of this State until the action is barred by the laws of the foreign State where the domicile existed.

2. SAME—*The Word "Accrue" Defined.*—To "accrue" is to "arise in due course;" "in law, to become a present and enforceable demand."

3. LIMITATIONS—*Presumptions as to Actions Arising in a Foreign State, Not Barred in Illinois.*—Where the plaintiff becomes a resident of this State a few months after the cause of action accrues to him in another State, and a bar of the foreign statute is not raised by plea, the court can not presume it was barred in the foreign State, where the action is not barred in Illinois.

4. CONTRACTS—*Remedies Lex Fori.*—Remedies on contracts are to be pursued according to the law of the place where the action is instituted, and not by the law of the place where the contract is made.

5. SAME—*Lex Loci Contractus.*—Personal contracts have the same interpretation and obligatory force in every other country, which they have in the country where they are made or are to be executed.

Attachment.—Trial in the County Court of Cook County, on appeal from a justice of the peace; the Hon. WALES W. WOOD, Judge, pre-

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siding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed February 14, 1899.

DALE & FRANCIS, attorneys for appellant.

JAMES H. WARD and WILLIAM B. BRADFORD, attorneys for appellee; ALFRED MOORE, of counsel.

This particular question is not decided by any case of our courts, which we have found, and must be decided upon principle rather than authority. It depends upon the question whether, under section 18, a cause of action "accrued" to appellee, as against appellant, when appellee became a "resident" of this State. *Wooley v. Yarnell*, 142 Ill. 442; *Humphrey v. Cole*, 14 Ill. App. 62; *Hibernian Banking Ass'n v. Com. Nat. Bk.*, 157 Ill. 524; *Wheeler et al. v. Wheeler et al.*, 134 Ill. 522.

Even if appellant properly pleaded or otherwise suggested the Illinois statute of limitations and the Arkansas statute, and properly proved the latter by evidence, the judgment is correct as rendered, because appellee was a resident here before appellant became a resident of Arkansas, and that the Illinois statute did not run while he was in the State of Arkansas, because appellee became a resident here before he located in Arkansas.

The statute of limitations of another State must be pleaded, if it is to be relied upon as a defense here. *L., N. A., etc., Ry. Co. v. Shires*, 108 Ill. 617; *Hyman v. Bayne*, 83 Ill. 256.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

Appellant was sued before a justice of the peace upon an open account alleged to have been contracted prior to July 1, 1882, in Detroit, Michigan, where both plaintiff and defendant then resided. Plaintiff moved to Chicago in the fall of that year, and has since resided in Illinois. In November, 1883, the defendant moved to Kansas City, and about a year later to Kentucky. There he remained until

some time in 1889, when he moved to Arkansas, where he has since continued to reside.

At the trial in the County Court on appeal from the justice, appellant read in evidence the statutes of Arkansas to show that actions upon open accounts are barred in that State in three years; and the statutes of Kentucky to show that such actions are barred in the latter State within five years from the time when such actions accrue.

It is contended that the action is barred in Illinois, by the statute, as follows :

“ When a cause of action has arisen in a State or Territory out of this State, or in a foreign country, and by the laws thereof an action thereon can not be maintained by reason of the lapse of time, an action thereon shall not be maintained in this State.” Rev. Stat., Chap. 83, Sec. 20.

This provision has been construed in *Hyman v. McVeigh*, mentioned in 87 Ill. 708, in a table of unreported cases, and reported in the *Chicago Legal News*, Vol. 10, p. 157. The case is referred to in *Wooley v. Yarnell*, 142 Ill., on page 449, and also in *Humphrey v. Cole*, 14 Ill. App. 56. The Supreme Court in that case, *Hyman v. McVeigh*, used the following language :

“ The words, ‘ when a cause of action has arisen,’ as they occur in the statute pleaded, should be construed as meaning when jurisdiction exists in the courts of a State to adjudicate between the parties upon the particular cause of action if properly invoked; or, in other words, when the plaintiff has the right to sue the defendant in the courts of the State, upon the particular cause of action, without regard to the place where the cause of action had its origin. This was the view taken in *Hyman v. Bayne*, 83 Ill. 256, although not discussed at length in the opinion, and we do not conceive that the question need be discussed now.”

In *Wooley v. Yarnell* (above cited) it is said that in *Hyman v. Bayne* and *Hyman v. McVeigh* :

“ As will be found upon an examination of the record, the maker and payee both resided out of this State, at the maturity of the cause of action sued on, and when the cause of action accrued, and so remained until an action was barred in and by the laws of the foreign State where the domicile existed. What was said in *Hyman v. McVeigh*, must be

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limited and confined to the facts presented by the record then before the court, that neither the maker nor the payee of the note, at the time the cause of action arose, resided in Illinois."

It will be seen that in the above quotation, the words "cause of action accrued" and "cause of action arose," appear to be used interchangeably. In the Century Dictionary one of the definitions of "accrue" is, "Arise in due course," and another is, "in law, to become a present and enforceable demand." A cause of action may properly, we think, be said to accrue, when the liability arises so far as to become enforceable.

The construction of section 20, as given in *Hyman v. McVeigh*, must then be limited and confined to causes where not only both parties resided out of this State when the action accrued, but both parties continued to reside out of the State, and "so remained until an action was barred in and by the laws of the foreign State where the domicile existed."

In the case at bar these conditions do not apply. The plaintiff became a resident of this State a few months after the cause of action accrued to him in Michigan. We can not presume it was then barred in Michigan. No such defense is set up. If there had been pleadings in the case, a bar of the Michigan statute could be raised by plea. There being no pleadings, it could have been presented by the introduction of the Michigan statute in evidence to sustain such defense, if it was relied upon. But it is not relied upon. It is not claimed it was then barred in Michigan. The reliance of the defense is upon the statutes of Kentucky and Arkansas, which were read in evidence.

The plaintiff became a resident of Illinois. His cause of action was a present and enforceable demand whenever the defendant could be bound here. He was under no obligation to follow the defendant to Missouri, Kentucky, and finally to Arkansas, and bring an action there. But, as is said in *Wooley v. Yarnell*, *supra*, on page 450, "he had the right to wait until the defendant returned to the State, and

then sue, and rely upon section 18 of the statute, should the defendant rely upon the time of his absence to create a bar to the action." The cause of action having accrued against the defendant, the action could be commenced against him, as it was, within the time limited by the statute, after his coming into the State.

In Angell on Limitations, Chap. VIII, the author says, referring to Story on Conflict of Laws: "That *remedies* on contracts are to be regarded and pursued according to the law of the place where the action is instituted, and not by the law of the place where the contract is made;" and he also says: "that personal contracts are to have the same validity, interpretation, and obligatory force in every other country which they have in the country where they are made or are to be executed."

In Banking Ass'n v. Com. Nat. Bank, 157 Ill. 524, 539, it was held that section 20 did not apply, "for the reason that the cause of action accrued in this State before his departure, and it could not be said to have arisen in Dakota."

In the case before us, the cause of action accrued before the defendant went to Arkansas or Kentucky.

In Humphrey v. Cole, 14 Ill. App. 56, it was said that under the facts, that case was governed by Hyman v. McVeigh. But the instrument sued on was payable at a place, the location of which did not appear, nor did the place of residence of the plaintiff appear during the time of the residence of the defendant in a foreign State. The views therein expressed as to the statute of limitations were unnecessary to the decision, it appearing that the debt had "been due more than twenty years prior to the bringing the suit," and hence the common law presumption of payment had arisen from such lapse of time.

The bar of section 20 of the statute of limitations being the only error relied upon, the judgment of the County Court must be affirmed.

MR. JUSTICE HORTON.

I concur in the result, but not in certain portions of the opinion.

In the Matter of Christian Busse.

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82 281

**In the Matter of Christian Busse, an Insolvent, Arrested
at the suit of Catherine Kennedy.**

1. **APPEALS—To Appellate Court.**—Section 8 of the Appellate Court act, as amended by the act of June 6, 1887, provides for appeals to the Appellate Court from all final judgments, orders or decrees of County Courts, in any case or proceeding at law or in chancery other than criminal cases, not misdemeanors, and cases involving a franchise, freehold, or the validity of a statute.

2. **SAME—To the Appellate Court from County Court in Insolvent Estates.**—An appeal from a final order of the County Court made in the administration of an insolvent estate, lies to the Appellate Court and not to the Circuit Court.

3. **SAME—To the Circuit Court in Cases Purely Statutory.**—An appeal from the judgment of a County Court in a proceeding which is purely statutory, and in no proper sense a suit or proceeding at law or in chancery, should be taken to the Circuit, and not to the Appellate Court.

4. **VOLUNTARY ASSIGNMENTS—Not a Purely Statutory Proceeding.**—A proceeding in the County Court under the act relating to voluntary assignments is not a purely statutory proceeding, but a chancery proceeding modified and regulated by the statute.

5. **STATUTES—Repeal by Implication.**—Section 26 of the Insolvent Debtor's act was repealed by implication by section 8 of the Appellate Court act.

6. **INSOLVENT DEBTORS—Entitled to Trial by Jury—Costs.**—When a debtor is imprisoned for debt upon charge of fraud, or upon execution on the charge of refusal to surrender his estate for the payment of any judgment, he shall be entitled, upon giving notice as provided in section 3 of the Insolvent Debtor's act, to have the question whether he is guilty of such fraud, or has refused to surrender his estate, tried by a jury. If the jury find him not guilty of such fraud, or refusal, he shall be discharged from the arrest or imprisonment, and the creditor at whose instance he was arrested or imprisoned shall be adjudged to pay the costs; if he be found guilty, he shall be remanded to the custody of the proper officer, but such finding shall not prevent his availing himself of other provisions of the act.

7. **PLEADING—Statutory Proceedings.**—Where no provision is made as to the pleadings nor the manner of framing the issue, the proceeding is one purely statutory.

Action on the Case, for personal tort. Trial in the County Court of Cook County; the Hon. JOHN H. BATTEN, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed February 28, 1899.

STATEMENT OF CASE.

Christian Busse was arrested under a writ of *ca. sa.* issued from the Superior Court in favor of Catherine Kennedy, and while he was held by the sheriff of Cook county under said writ, petitioned the County Court for release from such arrest, pursuant to the laws of this State relating to insolvent debtors.

Busse gave bond for his appearance, etc., the hearing of his application was adjourned to June 2, 1898, when he filed with the clerk of the County Court a certain schedule of all his property, real, personal and mixed, sworn to by him to be true in substance and in fact, all of which he claimed as exempt because he was the head of a family and residing with the same. Afterward, on the same day, a jury was called to try the issues (but what issues is not stated), and after hearing the evidence, arguments of counsel and instructions of the court, they rendered the following verdict, viz.: "We, the jury, find that the petitioner did not schedule all of his property." A motion for new trial was overruled and judgment rendered by the court, by which Busse was remanded to the custody of the sheriff, that he be placed in the jail of said county and so held until released by due process of law. From this judgment Busse has appealed.

The evidence shows that Busse was at the time of his arrest the head of a family and resided with the same; that he then made a schedule of all his property, which he handed to the sheriff, and that he did not then have, nor did he at the time of the hearing before the County Court have any other property of any kind not included in the schedule which he handed to the sheriff. The property scheduled was exempt under the statute. Busse asked the court to give two instructions, viz.:

1. "The court instructs the jury that the issue in this case is whether at the time the sheriff of Cook county made a demand on the petitioner for money or property where-with to pay or satisfy the amount of the execution in whole or in part in case of Kennedy v. Petitioner, the said peti-

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tioner had in his possession or control money or property (not exempt by law) to turn over to the sheriff toward the payment or satisfaction of said execution, and if you find from the evidence that he had no money or property at that time (excepting what was exempt by law) in his possession or control, then you should find the petitioner not guilty."

2. "The court instructs the jury that if you find from the evidence that Christian Busse, the petitioner in this case, had no other property excepting what he has scheduled in this case, at the time that the sheriff of Cook county made a demand upon him for money or property wherewith to pay or satisfy in whole or part the amount of the execution, in the case of Catherine Kennedy against said petitioner, then you should find the petitioner not guilty."

The court refused the instructions as asked, but modified the same by striking out the words at the end, "the petitioner not guilty," and inserting the words, "for the petitioner."

ARTHUR SCHROEDER, attorney for appellant, Christian Busse.

JAMES C. McSHANE, attorney for appellee.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Counsel for Catherine Kennedy suggests that this court has no jurisdiction of the appeal, because of Section 26, Ch. 72, Rev. Stat. (Hurd), of "The Act concerning Insolvent Debtors," which provides for an appeal to the Circuit Court from all final orders and judgments of the County Court under the provisions of that act. This act was in force July 1, 1872, and would control as to the court to which the appeal lies, unless it is repealed by Section 8 of the Appellate Court act (Ch. 37, Hurd's Rev. Stat., as amended by the act of June 6, 1887), which went into effect July 1, 1887, and provides for appeals to the Appellate Court of this State (among other cases not here in question), from all final judgments, orders or decrees of County Courts, "in any suit

or proceeding at law or in chancery other than criminal cases, not misdemeanors, and cases involving a franchise, freehold, or the validity of a statute."

We have received no aid from counsel on either side of this question, and the result of such investigation as we have been able to make leaves us still in doubt as to the jurisdiction of this court.

In *Huntington v. Metzger*, 51 Ill. App. 222, this court entertained jurisdiction of an appeal from the County Court in a case in all respects like the one at bar. The majority opinion does not refer to the question of jurisdiction, but Mr. Justice Gary, in a dissenting opinion, says that he speaks for the whole court in affirming the jurisdiction of the Appellate Court, referring to *Union Trust Co. v. Trumbull*, 137 Ill. 146, and *Lee v. People*, 140 Ill. 536. An appeal to the Supreme Court in this case was entertained (158 Ill. 272), and Mr. Justice Magruder, in an elaborate opinion, reversed this court, but did not mention the question of jurisdiction. A similar appeal (59 Ill. App. 46) was entertained in *Sawyer v. Nelson*, 160 Ill. 629, but jurisdiction was not considered so far as appears from the opinion.

In the *Trumbull* case, *supra*, which was a contest between creditors of an insolvent debtor in a voluntary assignment proceeding in the County Court, it was held that an appeal from a final order in that court made in the administration of the insolvent estate, lies to the Appellate Court, and not to the Circuit Court. The court construed the Appellate Court act, in so far as it related to chancery proceedings, as repealing by implication section 122 of chapter 37 (Hurd's Rev. Stat.), relating to appeals from County Courts generally, and held that a proceeding in the County Court, under the act relating to voluntary assignments, is not a purely statutory proceeding, but a chancery proceeding modified and regulated by the statute.

The *Lee* case, *supra*, was a bastardy proceeding in the County Court. The jurisdiction of the Appellate Court was sustained, on the ground that it was a proceeding at law, and therefore within section 8 of the Appellate Court act.

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In *Grier v. Cable*, 159 Ill. 29, it was held that an appeal from the judgment of a County Court in allowing or disallowing a claim against the estate of a deceased person, should be taken to the Circuit Court, and not to the Appellate Court, for the reason that such a proceeding is "purely statutory, and in no proper sense a suit or proceeding at law or in chancery."

In these three cases it was held that the Appellate Court act repealed by implication the County Court act with reference to appeals generally, in so far as it was in conflict with the latter act. We think the same reasoning applies as to the provision for appeal in section 26 of the Insolvent Debtor's act.

In *Martin v. Martin*, 170 Ill. 18, which was a proceeding in the County Court under the Administration Statute, Secs. 81 and 82, in the estate of a deceased person, to compel the production in that court by an executrix of certain concealed assets of the decedent, the appeal, which was to the Circuit Court, thence to the Appellate Court, and then to the Supreme Court, was entertained, though it was held that the appeal to the Circuit Court was proper, and also the proceeding was in the nature of a bill for discovery and for equitable relief. The Insolvent Debtor's act provides for a trial by jury as to whether the debtor is guilty of fraud, or has refused to surrender his estate, but no provision is made as to the pleadings nor the manner of framing the issue, and we should therefore be inclined to hold that the proceeding is one purely statutory, as in the case of claims (*Grier case, supra*), but for the fact that this court has heretofore affirmed its jurisdiction in a case in which that question was raised, and that appeals in two such cases have been entertained by the Supreme Court. The latter court, as well as this court, has frequently held it was its duty to dismiss an appeal or writ of error, *sua sponte*, whenever there was a lack of jurisdiction.

Being in doubt as to the jurisdiction of this court, we do not dismiss the appeal. The only question remaining is as to the verdict and judgment of the County Court. Section 5 of the Insolvent Debtor's act is, viz.:

“When any debtor is arrested or imprisoned for debt upon charge of fraud, or upon execution on the charge of refusal to surrender his estate for the payment of any judgment, he shall be entitled, upon giving notice as provided in section 3 of this act, to have the question whether he is guilty of such fraud, or has refused to surrender his estate, tried by a jury who may be summoned, tried and selected for that purpose. If the jury shall find the debtor ‘not guilty’ of such fraud, or refusal, as the case may be, the debtor shall be discharged from the arrest or imprisonment, and the creditor at whose instance he was arrested or imprisoned shall be adjudged to pay the costs of the arrest or imprisonment, and of such proceeding. If the debtor shall be found ‘guilty’ of such fraud or refusal, he shall be remanded to the custody of the proper officer, but such finding shall not prevent his availing himself of the other provisions of this act.”

It seems apparent, from this record, especially from the instructions of the court, that it was the intention of the parties and the court to try the issue as to whether Busse had refused to surrender his estate. This issue and that of fraud are the only ones on which the statute provides a jury trial. The subsequent sections of the statute after 5, relate wholly to proceedings to be taken by the court, without the intervention of a jury, in the event that the debtor is not discharged upon a trial of one or the other of the issues mentioned in section 5. It therefore seems plain that as the issue as to whether Busse had refused to surrender his estate was submitted to a jury and no further proceedings were had thereafter, except to render judgment on the verdict, the contention of appellee that the proceeding was one under section 6 and the subsequent sections of the act, is not tenable. These latter sections have no application whatever to this proceeding. There being no evidence that Busse had any other property than that scheduled at the time of the demand by the sheriff, the verdict of the jury, even if considered as responsive to the issue tried, was manifestly against the evidence, and Busse’s motion for new trial should have prevailed.

But the verdict was not responsive to the issue as to whether Busse had refused to surrender his estate. It might

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and could be absolutely true that Busse did not schedule all of his property, when he had not refused to surrender his estate.

The judgment is therefore reversed and the cause remanded.

Manufacturers Paper Company et al. v. Robert Lindblom et al.

1. **ATTORNEYS—*Inexcusable Negligence—Negligence of His Client.***—Attorneys who are served with notice by opposing counsel of his intention to make certain motions in court at a certain time, when their client's interest demands their presence, and who ignore such notice, are inexcusably negligent, and their negligence is the negligence of their client.

2. **STOCKHOLDERS—*Any One May be Made Party to Creditor's Bill.***—In the case of a creditor's bill against a corporation, the stock liability of any one or more stockholders may be enforced without making the other stockholders, parties.

3. **RECEIVERS—*When Not a Necessary Party to a Creditor's Bill.***—The mere appointment of a receiver in a prior creditor's bill without a conveyance to him of the company's assets, does not vest him with any such interest as will make him a necessary party to a subsequent creditor's bill filed by another creditor.

Creditor's Bill.—Trial in the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Finding and decree for complainants; appeal by defendants. Heard in this court at the October term, 1898. Reversed with directions. Opinion filed February 23, 1899.

STATEMENT OF CASE.

Appellees Lindblom and Klein, August 7, 1896, filed a bill against appellants, appellees Wulff, Felton and Bary, James Pease, the sheriff of Cook county, Chicago Daily Press Co. and Max Polachek, asking that a decree theretofore, on April 17, 1896, recovered by appellants against appellees and others, *pro confesso*, and upon evidence heard in open court, for different amounts, varying from \$500 to \$12,250, be set aside and decreed to be fraudulent and void

as to said Lindblom and Klein, and that the sheriff be enjoined from levying executions on their property, etc. Appellants and also Wulff, Bary, Felton, Pease and the Press Co. answered, and Wulff, Bary and Felton filed cross-bills, asking similar relief as to them. Polachek was defaulted. After issues were completed, a trial before the chancellor on testimony in open court, resulted in a decree which finds that on June 11, 1894, there was pending in this court, on the chancery side thereof, a suit commenced by the Manufacturers Paper Company and the Centralia Pulp and Water Power Company against the Chicago Daily Press Company, the original complainants herein, Lindblom and Klein, and the cross-complainants Wulff, Felton and Bary, together with Max Polachek, Lawrence P. Boyle, Joseph Hoffman, J. McVicker Brown, Leo Waterman and Frank T. Kinnare, administrator of C. A. Webb, deceased; that said bill was what is commonly called a creditor's bill, based upon certain judgments which are alleged to have been recovered against the Chicago Daily Press Company; that on June 11, 1894, there was pending in said suit the several demurrers of Wulff, Lindblom, Klein and Boyle to said bill; that on said June 11, 1894, said demurrers were called up and overruled; and a rule entered on said last named defendants to answer said bill within ten days from said June 11, 1894; that on June 26, 1894, default was entered against said Wulff, Boyle, Lindblom and Felton for not complying with the rule aforesaid entered on said June 11, 1894; that on April 30, 1895, like default was entered against Fred Klein for failure to comply with said rule; that on March 16, 1896, a decree was made and entered in said cause, making certain findings against said Chicago Daily Press Company, Lindblom, Wulff, Bary, Felton, Polachek, Klein and Boyle; that the overruling of the demurrers of Wulff, Lindblom, Klein and Boyle was wrongfully, inadvertently, improvidently and by misapprehension of the facts by the court, entered in said cause in violation and contravention of the rules of practice of said court and without due and proper notice under said rule to the respect-

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ive parties to said demurrers and their solicitors of the taking up and disposition of said matter; that the default of Wulff, Boyle, Lindblom and Felton taken June 26, 1896, was wrongfully, inadvertently, improvidently and by misapprehension of the facts made and entered in said cause in violation and contravention of the rules of practice of said court and without due and proper notice to the parties so defaulted and their solicitors; that the default of Fred Klein entered on April 30, 1895, was wrongfully, inadvertently, improvidently and by misapprehension of the facts by the court made and entered in said cause in violation and contravention of the rules of practice of said court and without proper notice to said Klein or his solicitors; that the decree made and entered in said cause on the 16th day of March, 1896, was, as against the said Lindblom, Klein, Wulff, Felton and Bary, wrongfully, inadvertently, improvidently and by misapprehension of the facts by the court, made and entered in said cause in violation and contravention of the rules of practice and without proper notice to said parties or their solicitors; that the overruling of the demurrers aforesaid and all subsequent orders, proceedings and decree aforesaid against the said Lindblom, Klein, Wulff, Felton and Bary, were improperly, inadvertently, improvidently and fraudulently made and entered, and were a fraud upon their rights.

And the court thereupon decreed that the order overruling the said demurrers of Wulff, Lindblom, Klein and Boyle be, and the same is, hereby set aside, vacated and annulled; that the said defaults of said Wulff, Boyle, Lindblom, Felton and Klein be, and are, hereby set aside, vacated and annulled; that the decree entered in said cause on the 16th day of March, 1896, as to the said Lindblom, Wulff, Boyle, Felton and Klein be, and are, hereby vacated, annulled and set aside.

The decree further recites that thereupon the Manufacturers Paper Company and the Centralia Pulp and Water Power Company elected to stand by the decree entered in said cause on the 16th day of March, 1896, and to stand

upon the record thereof as made, and excepted to the decree of this court vacating and setting aside said decree, and refused to further prosecute said last mentioned suit. Whereupon, it is adjudged, ordered and decreed that the bill of complaint in said case is dismissed for want of equity, the complainants offering no proof in support thereof.

From this decree the appeal is taken. It appears from the record, that the basis of the decree is a rule of the Circuit Court in which the original decree in appellants' favor was rendered, viz.:

"Contested Motions: Contested motions shall be deemed to include all motions pertaining to the settling of pleadings * * * and all other opposed motions, the hearing of which will operate to unduly delay the court in its other duties; a calendar of such motions will be made up on Friday of each week for hearing on the following Monday in the order of filing notice thereof with the minute clerk, and will be posted in the court room. The court may at its discretion continue the call of said calendar from day to day, or on a particular day to be specified without notice, except as may be announced during the call thereof, and may, whenever in its opinion, the exigency of the case requires it, hear particular motions at any time. * * * To entitle a motion to be placed and heard upon a contested motion calendar, notice thereof, together with a copy of all affidavits and all other pertinent and competent papers relied on and to be read in support thereof * * * must be served upon the solicitors of the opposing party before four o'clock in the afternoon of the preceding Thursday. * * * Said notice, with proof of acceptance of service thereof, must be delivered to the minute clerk before two o'clock P. M. of Friday."

This rule was in force at the time said demurrers were overruled and when the decree in appellants' favor was entered; and also evidence to the effect that notice of the taking up of these demurrers was served on the 8th and 9th days of June, 1894, on appellees' solicitors; that on Monday, the 11th day of June, 1894, at the hour of ten o'clock A. M., before Judge Tuthill, the complainants (appellants) would move that the demurrers be overruled and that a rule would be entered on each of the defendants to answer

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within a short time to be fixed by the court. This notice was received on the days named, 8th and 9th of June, 1894, by counsel for Lindblom, Klein and Wulff, without objection, but they gave no attention to the notice, except that they ascertained from an examination of the Law Bulletin published in Chicago, that contested motions would not be called by Judge Tuthill on June 11, 1894, but would be continued one week; that said counsel were subscribers to the Law Bulletin, which has been a law publication in Chicago for many years, and is generally relied on by lawyers, including said counsel, as to the course of business, the calls of calendars and motions, and of orders entered in the courts in Chicago; that although said counsel ascertained that on Monday, June 11, 1895, there would be no call of contested motion by Judge Tuthill, and the same would be continued one week, they made no examination of the Law Bulletin to ascertain what orders were entered by said judge, on that day, nor whether the motion in question was on the call June 18, 1894, nor whether any order was entered on said motion on that day; that the following is a copy of minutes of orders entered before Judge Tuthill on June 11, 1894:

“Term No. 4,226, general No. 109,467, Hilda R. Quitsel v. Marius H. Quitsel. Rule to show cause for failure to pay alimony, returnable Wednesday, 10 A. M.

Term No. 8,604, general No. 124,249, Manufacturers Paper Company et al. v. Chicago Daily Press Company et al. Demurrer Henry Wulff, Robert Lindblom, Fred Klein and Lawrence P. Boyle, overruled. Ruled to answer ten days.

Term No. 91, general No. 63,418, Hagins v. Mulvey. Motion for jury denied and dismissed as to George D. Phelps and John B. Drake, and as to lots 15 and 16, block of Derby's Sub.

General No. 130,792, George Rutter v. Switchmen's M. A. A. of N. A. Order appointing receiver vacated.

Term No. 8,445, Hulda Seifert v. Rudolph Merchant et al. Stipulation dismissed, N. C.

Term No. 8,725, general No. 124,641, Conklin, receiver, v. Springer. Order, answer guardian *ad litem* to be filed *nunc pro tunc* as of June 6, 1894. Decree to sell lots.

Term No. 6,318, general No. 116,043, Larson v. Atwater. Order to amend bill, file answer and replication (draft)."

That these orders and others appeared in said Law Bulletin, in the issue of that date, as having been entered by said judge on June 11, 1894; that on June 11, 1894, Judge Tuthill, besides entering the above orders, also had a general call of chancery cases, but in none of these were the pleadings settled except as above; that it was a common practice of said judge to hear motions of the nature of the motion in question, which were ordinarily heard as contested motions, as motions of course, when told by counsel that a demurrer was filed for delay, and the opposing counsel did not appear in opposition to the motion; that on August 21, 1882, the following general order was entered by the Circuit Court, viz.:

"Ordered that the rules of the Circuit Court of Cook county be amended by adding thereto a rule of procedure as follows:

'Hereafter, on the call of the trial calendar of common law cases, there will be a preliminary call of not exceeding fifty cases at 10 o'clock A. M., each day, for the purpose of ascertaining what cases are ready for trial, on which call cases will be marked for trial, dismissed or continued, as suggested by counsel or for cause shown, and when neither party to the suit answers, original suits will be dismissed for want of prosecution, and appeals will be dismissed with *procedendo*. After the preliminary calls motions will be heard, and then cases marked for trial will be taken up and disposed of in their order.

The preliminary calls will be dispensed with when cases marked for trial on previous call are likely to take up the time of the court for one or more days.

Announcements of the calls in the Chicago Daily Law Bulletin will be deemed sufficient to parties and their attorneys.'"

That in another case in which a receiver had been appointed for said Press Company, to which appellants were not parties nor privies, after a hearing upon evidence produced before Judge Tukey of said Circuit Court pursuant to an agreement of submission of matters in controversy, made under the statute in such case provided, it was held and

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decreed that said Lindblom was not liable for unpaid subscriptions or unpaid stock as a stockholder in said Press Company, which liability is the basis of the said decree against said Lindblom in appellants' favor, and that Lindblom and his said counsel had no knowledge of the entry of appellants' decree against him until June, 1896; that neither Wulff nor Felton knew of appellants' decree until June, 1896. The chancellor ruled that evidence offered on the question of indebtedness of Lindblom, Wulff and Felton to the Press Company was not admissible. No evidence on the question of indebtedness of Klein or Bary was offered, nor as to their knowledge of appellants' decree against them which, from its recitals, appears to have been *pro confesso* as to Klein and Bary. No evidence was offered by appellants.

DEFREES, BRACE & RITTER, attorneys for appellants.

It was not necessary to join all stockholders of the defendant company against which the judgment was entered. *Hatch v. Dana*, 101 U. S. 205; *Young v. Farrell*, 139 Ill. 326.

The receiver appointed in the Webb and Boyle cases was not a necessary party to the original bill. *Heffron v. Gage*, 149 Ill. 182.

The neglect of the attorneys to attend the hearing of the motion is to be imputed to appellees themselves, and the effect is the same as if it had been their personal neglect. *Weeks on Attorneys*, Chap. 12, Sec. 294; *Stenzel v. Sims*, 25 Ill. App. 538; *Schultz v. Meiselbar*, 44 Ill. App. 233; *Same v. Same*, 144 Ill. 26.

The receiver, not being in actual possession, and not having reduced the claims against the stockholders to his possession, and having no title thereto by virtue of his appointment, was not a necessary party to the bill. *Heffron v. Gage*, *supra*.

HENRY T. HELM, attorney for appellee Robert Lindblom.

W. J. BULGER, attorney for appellee Charles E. Felton.

STEDMAN & SOELKE, attorneys for Henry Wulff, contended

that the procedure in courts below was a fraud upon appellees.

The complainants in the creditor's bill in the court below in which the erroneous and injurious decree sought to be reviewed was entered, who are appellants here, were the moving parties who instigated and induced the wrongful action of the court below. They are held to have known that their notice served on Saturday, if any such was served, would not authorize the court to act upon the demurrers then pending; they are equally held to have known that the rules of the court required that such demurrers should only be considered upon the regular calling of the contested motion calendar; they are held to have known that the action of the court, in considering the same on that day in the absence of the opposite party, and in the entering of the order then entered, was doing a wrong which would cause an injury to the defendants in that procedure; they are held to have been parties to this open disregard of the rules of the court, and of the wrongful action of the court in the premises, and their acts are justly held in law to be a fraud upon the injured party. This position is supported by a large number of cases in our own courts. *Griggs et al. v. Gear*, 3 Gilm. 3; *McConnel v. Gibson*, 12 Ill. 128; *Shinkle v. Letcher*, 47 Ill. 217; *Harris et al. v. Cornell et al.*, 80 Ill. 54; *Chicago Bldg. Socy. v. Haas*, 111 Ill. 176; *Sutherland v. Reeve*, 41 Ill. App. 296; *Sayles v. Mann*, 4 Ill. App. 516; *Doughty v. Doughty*, 27 N. J. Eq. 315.

The appellees were not guilty of *laches* in not attending in pursuance of the notice given on Saturday. *Beveridge v. Hewitt*, 8 Ill. App. 567.

The rules of the court when established have the force of law and are obligatory upon the court itself as well as upon the parties to causes pending before it. While the court may at any time modify or even rescind its rules, yet until it does so it should administer them according to their terms and it can have no discretion to apply them or not according to its convenience unless such discretion is reserved in the rules themselves. *Owens v. Ranstead*, 22 Ill. 161; *I. C. R. R. Co.*

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v. Haskins, 115 Ill. 300; Beveridge v. Hewitt, 8 Ill. App. 467; Lancaster v. W. & S. W. Ry. Co., 132 Ill. 493; Consolidated R. T. & E. R. Co. v. O'Neill, 25 Ill. App. 314.

MR. PRESIDING JUSTICE WINDES after making the above statement delivered the opinion of the court.

Various contentions are made by appellants and appellees against and in favor of the action of the chancellor in setting aside the original decree in appellants' favor and in dismissing appellants' original bill for want of equity because they refused to further prosecute their said bill. Many of the points made we deem it unnecessary to consider, because of the conclusion we have reached.

This cause was before this court on an appeal by the present appellants from an interlocutory order of injunction granted upon the bill of appellees (68 Ill. App. 539). What is there said by Mr. Justice Shepard as to the nature of the bill, whether it was a pure bill of review or a bill in the nature of a bill of review, and upon the *laches* of appellees, fully and properly disposes of the contentions in that regard.

The rule of the Circuit Court in question, by its express terms, while under the definition it gives of contested motions is included the motion of appellants that the demurrers be overruled, vests the court with the discretion, "whenever in its opinion the exigency of the case requires it," to hear a particular motion at any time. This being so, the court acted clearly within its rule in hearing the motion of appellant to overrule the demurrers without placing it on the contested motion calendar. Moreover, the fact that Judge Tuthill, who heard and disposed of the demurrers, frequently heard similar motions without their being placed on the contested motion calendar, and that it does not appear but that the counsel representing the demurrers knew of such practice, would justify the presumption that they knew of such practice. But even if they did not, they were bound to take notice of the plain provision of the rule which vested the court with such power, and

when they were served with notice on Friday or Saturday before, that appellants' counsel would on Monday, June 11, 1894, at 10 A. M., or as soon thereafter as counsel could be heard, move that the demurrers be overruled, making no objection to such notice at the time and failing to make any objection known to the court, it became their imperative duty, in the interest of their clients, to attend before the court in obedience to the notice, and see to it that the motion was not heard without being placed upon the calendar of contested motions, or that they were heard and had knowledge of the disposition made of it by the court. Appellees make an especial point in their evidence and in argument, that they relied upon the Law Bulletin for information as to the calls of the courts from day to day and the orders entered, and have put in evidence a rule relating to the call of the trial calendar of common law cases, which has this provision, viz.: "Announcements of the calls in the Chicago Daily Law Bulletin will be deemed sufficient to parties and their attorneys," but they admit that they did not examine the same bulletin to see whether any order was entered on June 11, 1894, pursuant to the notices served upon them by appellants' counsel. They also say that they ascertained from notices in the same bulletin on June 8, 1894 (and that was a fact), that Judge Tuthill's contested motion calendar for June 11, 1894, was continued one week, but they did not examine the bulletin of June 18, 1894, to see if any disposition was made of the motion. This was inexcusable negligence on their part, and their negligence is the negligence of appellees. *Kern v. Strousberger*, 71 Ill. 413; *Ward v. Durham*, 134 Ill. 195; *Schultz v. Meiselbar*, 144 Ill. 26; *Bardonski v. Bardonski*, Id. 284.

But conceding that the notice was proper, and the court did not err in proceeding to a disposition of the demurrers upon such notice, it is argued that the demurrers should have been sustained because a receiver of the Press Company who had been previously appointed in another creditor's bill was not a party, nor were all the stockholders of the Press Company made parties, and that both the receiver and all the stockholders were necessary parties.

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We can not assent to this contention. Appellants' bill was a creditor's bill—not a bill to wind up a defunct corporation and distribute its assets among its creditors. In the case of a creditor's bill against a corporation, the stock liability of any one or more stockholders may be enforced without making the other stockholders parties. *Young v. Farwell*, 139 Ill. 326; *Siegel v. Andrews & Co.*, 78 Ill. App. 611.

The mere appointment of a receiver in the prior creditor's bill, without a conveyance to him of the Press Company's assets, did not vest him with any such interest as made him a necessary party to appellants' bill. *Heffron v. Gage*, 149 Ill. 182, and cases cited.

The fact that Lindblom in the hearing before Judge Tuley was held not to be liable, was in no way binding upon appellants, as they were not parties to that case, having withdrawn from it more than a year before, and even if they were, Lindblom should have interposed the adjudication as a defense to appellants' bill.

The finding and decree of the chancellor that the order overruling the demurrers, all subsequent orders, proceedings and decree in appellants' favor were inadvertently and fraudulently made, and that they were a fraud upon appellees' rights, are manifestly against the evidence in the record. We have seen that, under the court's rule, they were not improperly nor improvidently made and entered. While the decree is manifestly against the evidence, in so far as it sets aside the former decree and the order overruling the demurrers, and is also wholly unwarranted in dismissing appellants' bill for want of equity instead of for want of prosecution, because they offered no evidence in support of it (*Hoffman v. Schoyer*, 143 Ill. 621), and must for these reasons be reversed, we are further of opinion that the negligence of appellees is such as to bar them of any relief, and that the decree should be and is reversed, with directions to the Circuit Court to dismiss the bill of Lindblom and Klein, and also the cross-bills of Wulff, Felton and Bary for want of equity.

Reversed with directions.

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S. L. Davis, use of, etc., v. Siegel, Cooper & Co.

1. **GARNISHMENT—When Garnishee Must Answer as to Indebtedness to Judgment Debtor.**—Section 5 of the Garnishment act, as judicially construed, requires the garnishee to answer as to his indebtedness to the judgment debtor, first, when the debt is owing and due at the date of service; second, when it is owing at the date of service and becomes due thereafter; and third, when it is owing and due at any time after the service of the writ, up to the date of the answer.

2. **SAME—What Wages are Exempt from.**—The wages for services of a defendant, who is the head of a family and residing with the same, to the amount of eight dollars per week, is exempt from garnishment.

3. **SAME—Act of 1872—Unearned Wages.**—The act of 1872 does not contemplate the garnishment of unearned wages.

4. **SAME—Act of 1872—Requirements—Judgment and Return of Execution.**—By section 1 of the Garnishment act, there must be a judgment, the issuance of the execution, and a return “No property found,” in order to maintain proceedings in garnishment.

5. **CONSTRUCTION OF STATUTES—The Garnishment Act of 1872 to be Liberally Construed.**—The Garnishment act of 1872 was enacted for the benefit of the debtor’s family as well as himself, and should receive a fair and liberal construction so that it may effectuate the object the legislature had in view.

Garnishment.—Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Finding and decree for the garnishee. Error by plaintiff (garnishor). Heard in this court at the October term, 1898. Affirmed. Opinion filed February 23, 1899.

STATEMENT.

On affidavit of Edward K. Boyd, filed August 6, 1897, that at the April term, 1897, he recovered judgment against S. L. Davis for \$175 debt, and \$15.75 costs; that execution was issued on said judgment and was returned “No property found;” that Davis had no property within the affiant’s knowledge liable to execution, but that affiant had reason to believe that Siegel, Cooper & Co. was indebted to Davis, etc. The garnishee was served with process, August 7, 1897, and answered interrogatories filed by the alleged judgment creditor, in substance, that, at the date of service of the writ on it, Davis was and still remained in its employ; that at said

Davis v. Siegel, Cooper & Co.

time his salary was \$20 per week, payable after the first day of the week next after being earned; that August 6, 1897, it advanced to Davis \$20, and thereafter, and up to the time of answering, it had advanced to him, on the first day of each following week, a like sum, with the understanding that he would pay in services thereafter to be rendered, and that Davis was the head of a family and resided with his family. A replication was filed to the answer, and the cause, by agreement, was tried by the court, without a jury, and the court found the issues for appellee and rendered judgment accordingly.

MITCHELL & ADDINGTON, attorneys for plaintiff in error.

Garnishment statutes are remedial in their character and should receive a liberal interpretation, so that the remedy may be promoted and its purposes subserved. *Am. & Eng. Enc. of Law*, Vol. 8, 1104; *Ill. Cent. R. R. Co. v. Weaver*, 54 Ill. 319; *R. R. Co. v. Crane*, 102 Ill. 249.

Section 5 aforesaid has been construed and held to require the garnishee to answer in the following instances: First, where the debt is owing and due at the date of service; second, where it is owing at the date of service and becomes due thereafter; and, third, where it is owing and due at any time after the service of the writ, up to the date of the answer. *Hanover Fire Ins. Co. v. Connor*, 20 Ill. App. 297; *Young v. Nat'l Bank of Cairo*, 51 Ill. 73; *Wilcus v. Kling*, 87 Ill. 107.

Sections 5 and 14 of the act are construed together, and the rule announced that the process of garnishment does not reach wages earned after the service of the writ, and prior to the filing of the answer. *Bliss v. Smith*, 78 Ill. 359; *Hoffman v. Fitzwilliam*, 81 Ill. 521.

No statute should be so construed as to protect a fraud. *Rogers v. Brent*, 5 Gil. 573.

A. BINSWANGER, attorney for defendant in error, contended that garnishee process will not reach wages that the debtor may earn after the service of the writ and before the filing of the answer. *Bliss v. Smith*, 78 Ill. 359; *Hoffman v. Fitzwilliam*, 81 Ill. 521.

In the absence of any evidence of the alleged judgment upon which the garnishment purports to be founded the case must be affirmed. *Gilcreest v. Savage*, 44 Ill. 56; *Pierce v. Wade*, 19 Ill. App. 185; *McNeill v. Donohue*, 44 Ill. App. 42; *Siegel, Cooper & Co. v. Schueck*, 60 Ill. App. 429.

MR. JUSTICE ADAMS delivered the opinion of the court.

Counsel for plaintiff rely on the Garnishment act, and especially on section 5 of that act, which, as judicially construed, requires the garnishee to answer as to indebtedness to the judgment debtor, "first, when the debt is owing and due at the date of service; second, when it is owing at the date of service and becomes due thereafter; and, third, when it is owing and due at any time after the service of the writ, up to the date of the answer." *Hanover F. Ins. Co. v. Connor*, 20 Ill. App. 297, 309.

Counsel further contend that the payment to Davis of his wages, in advance of his earning them, was fraudulent as to plaintiff and collusively evasive of the statute, and also that section 14 of the Garnishment act, as amended by an act in force July 1, 1897, constitutes no defense to the claim against the appellee. Section 14, as amended, is as follows:

"The wages for services of a defendant, who is the head of a family and residing with the same, to the amount of eight dollars per week, shall be exempt from garnishment. All above the sum of eight dollars per week shall be liable to garnishment. *Provided*, the person bringing suit shall first make a demand in writing for the excess above the amount herein exempted. No costs or expenses shall be chargeable to the defendant, unless he shall refuse to turn over to the creditor the amount due him that is herein exempted, upon such written demand."

Counsel for plaintiff contend that the Garnishment act, including amended section 14, should be construed liberally in favor of the remedy. Section 14 is for the benefit of the judgment debtor and his family, and in *Bliss v. Smith*, 78 Ill. 359, the court, commenting on a similar section in the Garnishment act of 1872, say:

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“The statute was enacted for a humane purpose; for the benefit of the debtor’s family as well as himself; and should receive a fair and liberal construction that it may effectuate the beneficent object the legislature had in view.”

In Bliss v. Smith, *supra*, and also in Hoffman v. Fitzwilliams et al., 81 Ill. 521, the court held that section 14 of the act of 1872 had no application to wages earned after service of the garnishment writ, basing this decision partially on the ground that the section only authorized garnishment of the excess over \$25 in the hands of the garnishee.

Does section 14, as amended, authorize garnishment of wages earned after service of the writ? The section provides that, as a condition precedent to bringing suit, “The person bringing suit shall first make a demand in writing for the excess above the amount herein exempted. No cost or expenses shall be chargeable to the defendant, unless he shall refuse to turn over to the creditor the amount due him above that herein exempted, upon such written demand.” It must be admitted that the provision is not very lucid. The person mentioned as “defendant” in it, is apparently the judgment debtor, he being named as defendant in the first line of the section. If this view is correct, it is on the judgment debtor that demand must be made. If, on the contrary, the intention of the statute is that the demand shall be made on the garnishee, then, in this case, there was no demand, a demand having been made only on Davis, the judgment debtor. The provision must receive a reasonable and practical construction. It can not be presumed that the making demand was intended as a mere form, or that a demand was intended of such nature that it would be nugatory by reason of the impossibility or impracticability of compliance with it. The law does not require performance of useless acts. The demand intended is one which can be complied with by the person on whom made, not one which he can not comply with. Clearly, a debtor can not comply with a demand to turn over to the judgment creditor wages which the former has never earned and may never earn. He can not turn over that which is non-existent, and if, by a proper construction of the section, the

demand should be made on the garnishee, it is plain that the latter could not be required to turn over unearned wages.

We are therefore of opinion that the statute does not contemplate the garnishment of unearned wages.

July 26, 1897, a demand in writing was made on Davis, of which the following is a copy :

“S. L. DAVIS, Esq.

You are hereby notified that I hold against you a judgment for one hundred and seventy-five dollars (\$175) and costs and interest, rendered in the Circuit Court of Cook County, Illinois, (case No. 163,358), which remains wholly unpaid and unsatisfied.

I therefore demand that you pay me on account of said judgment all your salary due or to become due to you from Siegel, Cooper & Company in excess of your legal exemption of eight dollars (\$8) per week, as the same becomes due to you.

And in default of your complying with this demand, I shall hold you liable for such excess in an action of garnishment as by the statute I am entitled.

Dated at Chicago, this 26th day of July, 1897.

Respectfully,
EDWD. K. BORD.”

For the reasons stated, this demand was of no effect as to unearned wages, and we are of the opinion that, in view of the evidence, it was ineffective for any purpose. There is no evidence that there was anything due to Davis from the garnishee when the notice was served, or even that at that time he was in the employ of the garnishee. The evidence shows that he was in the garnishee's employ August 6, 1897, and it would appear from the remarks of counsel for the respective parties, on the trial, that he was in the garnishee's employ prior to August 6, 1897; but how long prior to that date does not in any way appear and can not be presumed. The answer of the garnishee is, as before stated, that August 6, 1897, the garnishee advanced Davis a week's salary, also that on the first day of every week thereafter, up to the time of filing its amended answer, it had advanced him a week's salary; that during said time it owed him nothing, and that at the date of the service of the writ, it was not

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in any way indebted to him. Plaintiff relied solely on the garnishee's answer in respect to its indebtedness to Davis. There having been nothing due to Davis at the date of service of the writ, and holding, as we do, that the statute has no application to unearned wages, this is conclusive as against plaintiff's claim.

But aside from the foregoing considerations, the judgment must be affirmed. By section 1 of the Garnishment act, there must be a judgment, the issuance of an execution and a return of the execution "No property found," in order to maintain the garnishment. *Railroad Co. v. Keohane*, 31 Ill. 144; *Dunderdale v. W. Electric Co.*, 51 Ill. App. 407; *D. Laundry Co. v. C. & A. R. R. Co.*, 55 Ib. 438; *P. I. & I. Co. v. Olson*, 63 Ib. 313.

In the present case, there was no evidence that an execution ever issued. The affidavit for garnishment process avers that an execution was issued and returned "No property found," but the affidavit is not evidence, nor is it contained in the bill of exceptions.

We find no error in the refusal of propositions submitted by plaintiff as propositions of law.

The judgment will be affirmed.

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1. RENTS AND PROFITS—*When the Owner of the Equity of Redemption is Entitled to.*—The owner of the equity of redemption is entitled to the rents and profits after sale and pending redemption, where the sale brings the full amount due under the decree.

2. SAME—*When to be Applied to Payment of Mortgage Debt.*—Where the mortgage creates a lien on the rents and profits for the payment of any portion of the mortgage debt which may remain unsatisfied during the whole period allowed by law for redemption, they should be applied to the payment of any deficiency due the mortgagee after sale.

3. RECEIVERS—*Courts of Equity May Appoint—Mortgages.*—A court of equity may appoint a receiver even when the mortgage does not, by express words, give a lien upon the income derived from the property, to take charge of it and collect the rents, issues and profits arising therefrom.

Such action will not be taken, however, unless it be made to appear that the mortgaged premises are an insufficient security for the debt, and the person liable personally for the debt is insolvent, or at least of very questionable responsibility.

Petition for Rents and Profits, pending foreclosure. Trial in the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Hearing and decree for petitioner; appeal by respondent. Heard in this court at the October term, 1898. Reversed and remanded with directions. Opinion filed February 28, 1899.

THATCHER & GRIFFEN, attorneys for appellant.

A mortgagee in possession, either by receiver or by himself, is entitled to rents. High on Receivers, Sec. 643, 644; Fifield v. Gorton, 15 Ill. App. 460; Stephen v. Reibling, 45 Ill. App. 40.

When a receiver is appointed in a suit to foreclose a first mortgage, the second mortgagee being a party, and the first mortgage is satisfied out of the proceeds of the foreclosure sale, the second mortgagee may resort to the rents collected by the receiver to pay any deficiency due him; in such case, the first mortgagee having procured the receiver, and having the right to satisfy his debt either out of the proceeds of sale or rents collected by the receiver, if he elects to take the proceeds of sale the second mortgagee is entitled to be subrogated to the rents. High on Receivers, Sec. 688; Keogh v. McManus, 34 Hun (N. Y.), 521; Hitz v. Jenks, 123 U. S. 297.

By the appointment of a receiver the mortgagee obtains an equitable claim upon the rents to accrue, and his right to them is superior to that of any one else claiming under the mortgagor. Oakford v. Robinson, 48 Ill. App. 270; 2 Jones on Mortgages, Sec. 1536.

BOWLES & BOWLES, attorneys for appellee.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

The question presented for decision by this record is whether the owner of the equity of redemption of certain

premises is entitled to the rents and profits thereof pending and after the foreclosure and sale of the same at the suit of a first incumbrancer, who bid at the master's sale the full amount due him under the court's decree, as against a second incumbrancer who was a party to the foreclosure, filed his cross-bill, procured, as part of the decree of sale, a decree establishing his lien upon the premises, subject to the lien of the first incumbrance, ordering its payment, and, in default thereof, for sale to satisfy the same.

In consideration of this question there must also be considered the further facts which appear from the record, that pending the foreclosure, on the application of the first incumbrancer, under a proper showing, a receiver of the rents and profits was appointed, who took possession of the premises under the order appointing him and has ever since retained such possession; that on the coming in of the master's report of sale showing that the first incumbrancer was paid in full by the sale, but the second incumbrancer had been paid nothing, and to whom there was owing \$2,788.91, the court confirmed the report and ordered that the receiver continue to act as such receiver, to collect rents, etc., of the premises, until redemption be made or until the period therefor should expire, and to bring the net results into court for a further order; and the fact that the premises (as alleged by the second incumbrancer, which must be taken as true for the purposes of this case) "are worth but little, if anything, more than the amount for which the same were sold" to the first incumbrancer and lawful interest thereon, and that the makers of the notes which were secured by the second incumbrance are insolvent; also, that it does not appear from this record whether the second incumbrance conveyed the rents and profits of the premises.

In *Davis v. Dale*, 150 Ill. 239, it was held that the owner of the equity of redemption is entitled to the rents and profits after sale and pending redemption, the sale having resulted in bringing the full amount due under the decree.

In *First Nat. Bank v. Ill. Steel Co.*, 72 Ill. App. 640, where the mortgage in express terms created a lien on the

rents and profits for the payment of any portion of the mortgage debt which might remain unsatisfied during the whole period allowed by law for redemption, the second District Appellate Court, Mr. Justice Crabtree delivering the opinion, held that the rents, after sale, leaving a deficiency due the mortgagee, should be applied to the payment of such deficiency. On appeal to the Supreme Court (174 Ill. 140), the Appellate Court was affirmed, both because of the provision of the mortgage creating a lien on the rents and profits, and upon general principles of equity which allow the appropriation of rents and profits to the payment of a mortgage debt when the property is insufficient security and the mortgagor insolvent. The court say :

“ That a court of equity has power to appoint a receiver and grant equitable relief where there are no express words in the mortgage giving a lien upon rents and profits derived from the property, is conceded. In such a case, whether relief will be granted is dependent upon the facts and circumstances at the time the application is made. This court said in *Haas v. Chicago Building Society*, 89 Ill. 498 (at p. 502): ‘ We find the decided weight of American authority to be in favor of the proposition that the court may, even when the mortgage does not by express words give a lien upon the income derived from such property, appoint a receiver to take charge of it and collect the rents, issues and profits arising therefrom. Such action will not be taken, however, unless it be made to appear the mortgaged premises are an insufficient security for the debt, and the person liable personally for the debt is insolvent, or at least of very questionable responsibility. A combination of these two things seems to be required in all the cases we have examined, and in one or more of the States it is held necessary, still other elements should be conjoined to these before such procedure is justified.’ * * * In *Haas v. Chicago Building Society*, *supra*, it was said (p. 506): ‘ The necessity for the appropriation of the rents to the payment of the mortgage debt may frequently not appear until after both decree and sale. The amount due is often matter of dispute, and can only be determined by the decree, and what the property will sell for can only be ascertained with certainty from the result of the judicial sale. If an appropriation of the rents on the indebtedness is justified by the surrounding facts before sale we see no good reason why the same and more weighty

facts existing after sale may not warrant a similar procedure. The security, plainly, is not exhausted by the sale, for there is a fund included in it which is secondarily liable. It is true the mortgagee has elected to foreclose and sell, but then he has pursued that remedy to the end and without getting satisfaction of his debt, and he may avail himself of any just and equitable means of collecting the residue; not that he may have such extraordinary remedy in all cases of a deficit in the proceeds, but only where it is indispensably necessary for his protection, and just and equitable.' "

This seems decisive of the case at bar. While it is true that the receiver was in the first instance appointed on the application of the first incumbrancer, he was continued at the instance of the second incumbrancer, who was seeking to foreclose by cross-bill in the same case, the trust deed in his favor, there still remaining due to him \$2,788.91, which the court had decreed to be a lien on the premises subject to the first incumbrance. The fact that the property on sale only brought sufficient to pay the first incumbrance is strong evidence that it was worth no more, and besides, the record shows that it was worth but little, if anything, more than that amount and lawful interest thereon. It certainly was not worth \$2,788.91 more than it sold for, and this, taken in connection with the further fact that the makers of the incumbrance were insolvent, makes a basis for the appointment, and, therefore, for the continuation of the receiver pending redemption, under the equitable principles above announced by the Supreme Court, irrespective of the fact that the record fails to show that there was an express lien on the rents and profits under the terms of the second incumbrance. It could make no difference in principle that the deficit remained on the second rather than on the first incumbrance.

The decree of the Circuit Court is reversed, and the cause remanded with directions to enter a decree ordering the receiver to apply the net rents and profits in his hands covering the period in question to the payment of the amount due appellant under the decree of foreclosure, and retain any surplus for further direction of the Circuit Court. Reversed and remanded with directions.

Paul Jummel v. Nicholas J. Mann.

1. **DELIVERY—Of a Deed—What is a Sufficient.**—Any disposition made of a deed by the grantor, with the intention thereby to make delivery of it, so that it shall become presently effective, will, if accepted by the grantee, constitute a sufficient delivery.

2. **SAME—Of Release Deed—Intentions of Parties, How Shown.**—The intention to deliver on the one hand, and of acceptance on the other, may be shown by direct evidence of the intention, or may be presumed from acts or declarations, or both acts and declarations of the parties, constituting parts of the *res gestæ*, which manifest such intention.

3. **PRINCIPAL AND AGENT—When the Agent's Knowledge is Not Constructive Notice to His Principal.**—An agent's knowledge is not constructive notice to the principal when the agent is dealing in his own interest with his principal and against the interest of such principal.

4. **RELEASE—Of Trust Deed—Unauthorized, Has no Effect upon Subsequent Purchasers, with Notice.**—An unauthorized release has no effect upon a trust deed as to subsequent purchasers with notice.

5. **SAME—Before Maturity of Mortgage—Ordinary Care in Paying Note.**—It is not such care as ordinarily prudent persons observe in the transaction of business, to pay off a note secured by mortgage, and take a release from the mortgage before its maturity without seeing or taking up the note or making inquiry as to whether the mortgagee is still the holder of the note.

6. **RECORDS—Of Written Instruments—Take Effect When.**—All deeds, mortgages and other instruments of writing which are authorized to be recorded, take effect from the time of filing the same for record, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers are adjudged void as to all such creditors and subsequent purchasers, without notice, until the same are so filed for record.

Bill in Chancery.—Trial in the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Hearing and decree for complainant; appeal by defendant. Heard in this court at the October term, 1898. Reversed with directions. Opinion filed February 28, 1899.

STATEMENT OF CASE.

Amelia Thomas and James S. Thomas conveyed lots 4 and 5 in a certain subdivision to Theodore H. Schintz, trustee, by their trust deed, dated September 30, 1886, securing their principal note for \$4,000, payable five years after date to their own order with interest at six and one-half per

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cent per annum, both principal and interest being payable at the office of Schintz. The installments of interest were evidenced by ten interest notes and all of the notes were indorsed by Amelia and James S. Thomas to the order of John Lobstein. Lot 4 was released June 18, 1888, as to which there is no question, the controversy being only with reference to lot 5. The principal note came due September 30, 1891, and a writing was executed purporting to extend the note until September 30, 1896, subject to the payment of ten new interest notes for \$130 each. At the time of this extension Schintz took up the principal note, and afterward, October 12, 1891, sold it, with the new interest notes and extension agreement, to Mann.

About September 1, 1896, Mrs. Thomas saw Schintz with reference to a renewal or extension of the loan which fell due at the end of that month. Schintz told her that the owner of the mortgage wanted his money, but that there was another party who would take the loan, and that she and her husband would have to sign new papers. He said he would use the proceeds of the new loan to pay off the old. Pursuant to this arrangement, Mr. and Mrs. Thomas executed a new trust deed to Schintz, dated September 9, 1896, which was acknowledged September 14, 1896, and recorded September 15th, and was given to secure the principal note of Mr. and Mrs. Thomas for \$4,000, payable five years after date, with interest at six and one-half per cent per annum, and ten interest notes for \$130 each, all payable to their own order and by them indorsed. At the time these papers were executed, Schintz told Mrs. Thomas that she would have to pay \$3.10 for a release of the old trust deed. It is claimed that the release deed was never delivered. Mr. and Mrs. Thomas were ignorant about business, and had only a vague conception of the legal nature of their transactions with Schintz; but it is shown that Schintz charged them for a release of the old trust deed and told them he would attend to it. He told Mrs. Thomas that he would get the old trust deed released, and that she had nothing to do except to pay the money. In a subsequent

statement rendered by Schintz to Mr. and Mrs. Thomas, a charge of \$3.10 is made for a release deed and recording same, as of September 30th, the date when the old loan matured.

Mann's note fell due September 30, 1896. A few days before that date he went to the office of Schintz and was told that the Thomases wanted the loan extended for a year. Schintz asked him whether he was satisfied with that arrangement, and he said he was, and went away supposing that his loan had been or would be extended for a year. A day or two later he called at the office of Schintz, from whom he received a check in payment of the last interest note for \$130 held by him. Mann did not receive any extension agreement nor any new interest notes at this time, but relied on Schintz's statement that the Thomases wanted to extend the loan for a year instead of paying the note. Mann paid no further attention to the matter until about April 1, 1897, when he went to the office of Schintz and received a check for \$130 as six months interest on the loan, which he supposed had been extended. Mann accepted and relied upon Schintz's false statements before Jummel had any dealings with Schintz.

On the 6th day of October, 1896, Schintz executed and acknowledged a release deed, by which he assumed to "convey, remise, release and quit-claim" to Amelia and James S. Thomas all right, title or interest acquired by him under the trust deed dated September 30, 1886. This release deed was filed for record on the same day, with the words "Box 519" printed or indorsed on the outside, being the box in the recorder's office rented by Schintz, in which papers were placed to be returned to his office. The release deed was placed in that box after being recorded and was subsequently returned to Schintz's office. It never came to the hands of Mr. and Mrs. Thomas.

After releasing this deed Schintz listed the new securities among the mortgages which he had for sale. Jummel at that time had some money which he wished to invest. He was bookkeeper for the Independent Brewing Association,

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which had done business with Schintz, as its attorney, and he sent a Mr. Frickow down to the office of Schintz to get a memoranda of mortgages, which he had for sale. Frickow brought back several memoranda, and among them, a memorandum of the new Thomas loan. Jummel selected this and went down to see Schintz about it on the 14th of October. He told Schintz he wanted a first mortgage, and Schintz told him that this was a first mortgage. Before Jummel went out to get the money to pay for the papers he asked Schintz if it was a first mortgage, and Schintz said yes, it was a good first mortgage. Jummel thereupon went to the Union Trust Company Bank, and procured two cashier's checks, amounting to \$4,000, which, with \$25.25 for accrued interest, he paid to Schintz, and took the securities away with him October 14, 1896. The first interest note fell due March 9, 1897. Jummel sent it to Schintz for collection, and on the day of its maturity Frickow called but was told that the money had not come in. The next day, however, Jummel received a check from Schintz for the amount. He heard nothing more about the matter until after the failure of Schintz, which occurred in July, 1897.

Mann and Jummel both relied upon Schintz. Mann had the title examined by Schintz, and had no other lawyer when he bought the first set of papers. He had been dealing with Schintz in this way for a long time. Schintz told him that he was buying a first mortgage. He never went to look at the property, but left the whole matter in the hands of Schintz. Jummel was equally confiding. Schintz told him he was buying a first mortgage, and he accepted this statement. He did not have the title examined, and did not have any search made in the recorder's office. He did not look at the property before buying, but had perfect confidence in Schintz. In point of reliance on Schintz there is nothing to choose between the parties. Both trusted him completely.

Schintz failed to pay the money received from Jummel to Mann, and on the 10th day of August, 1897, Mann took

a judgment by confession against Mr. and Mrs. Thomas on the old note, and on the 9th day of September filed his bill to foreclose the trust deed and set aside the release. Jummel filed his cross-bill to foreclose the trust deed securing his notes, claiming that his lien was superior to Mann's. Mr. and Mrs. Thomas also filed their cross-bill to enjoin the collection of Mann's judgments. After issues were made, there was a reference to the master to take proof and report the same with his conclusions. The master recommended a decree setting aside the release, and making the Mann trust deed a first lien, the trust deed securing the notes held by Jummel a second lien, dismissing the cross-bill of Mr. and Mrs. Thomas, and directing a sale of the property to pay the liens in said order. Jummel alone has appealed.

WILLIAM W. CASE, attorney for appellant.

Delivery and acceptance rest on the intention of the parties. *Masterson v. Cheek*, 23 Ill. 72; *Walker v. Walker*, 42 Ill. 311; *Price v. Hudson*, 125 Ill. 284; *Miller v. Meers*, 155 Ill. 284.

Knowledge of an agent is not imputed to his principal when the agent's purpose would be thwarted by imparting that knowledge. *Kennedy v. Green*, 3 M. & K. 699; *Wright v. Bruschke*, 62 Ill. App. 358; *Gammon v. Huse*, 100 Ill. 234; *Higgins v. Lansingh*, 154 Ill. 301; *Seaverns v. Presbyterian Hospital*, 173 Ill. 414.

In no case, whether the grantees be infants or adults, is a formal delivery and acceptance essential, though there must be acts shown evincing such intention. The intention of the party is the controlling element in contracts of this character, and whenever it is manifest by facts and circumstances that the grantor in delivering a deed to the recorder to be placed on record, without any explanation, intended to part with his title, the presumption is and should be that he then delivers it for the benefit of the grantee and it should and will take effect from that moment, an acceptance by the grantee being presumed from the beneficial nature of the transaction. *Masterson v. Cheek*, 23 Ill. 72.

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No formal delivery to the grantee in person was necessary. If the grantor in a deed intends, when executing it, to be understood as delivering it, that is sufficient. The intention of the party is the controlling element. *Walker v. Walker*, 42 Ill. 311.

Any disposition made of the deed by the grantor with the intention thereby to make delivery of it, so that it shall become presently effective as a conveyance of the title, will, if accepted by the grantee, constitute a sufficient delivery. The intention to deliver on the one hand and of acceptance on the other may be shown by direct evidence of the intention, or may be presumed from acts or declarations, or both acts and declarations of the parties, constituting parts of the *res gestæ* which manifest such intention. *Price v. Hudson*, 125 Ill. 284; *Miller v. Meers*, 155 Ill. 284, 293.

The reason why knowledge of an agent is imputed to his principal is that it is presumed he will communicate his knowledge as in duty bound. The rule is applicable only when that presumption holds good. Hence it can not be invoked in case of a sale by the agent to his principal, nor in any other case where the personal interest of the agent is adverse to that of the principal, or where the agent's plans would be defeated by communicating the knowledge which he possesses. *Kennedy v. Green*, 3 M. & K. 699, 717; *Wright v. Bruschke*, 62 Ill. App. 358, 367; *Gammon v. Huse*, 100 Ill. 234, 241.

As a rule a principal is chargeable only with knowledge of that which his agent learned in the course of his agency, not with what he learned in his private business or as agent for some one other than the principal sought to be charged. *Wright v. Bruschke*, 62 Ill. App. 358, 367, and cases cited.

IVES, MASON & WYMAN, attorneys for appellee.

The execution and recording of the deed without delivery does not render it operative. The subsequent assent of the grantee to receive it renders it for the first time operative. *Kingsbury v. Burnside*, 58 Ill. 310; *Dale v. Lincoln*, 62 Ill. 22; *Brown v. Brown*, 167 Ill. 631.

It is essential to delivery that there be an acceptance.

Herbert v. Herbert, Breese, 354; 1 Devlin on Deeds (2d Ed.), Sec. 285, and cases cited; Bryan v. Walsh, 2 Gilm. 557; Ferguson v. Miles, 3 Gilm. 358; Dickerson v. Merriman, 100 Ill. 342; Weber v. Christen, 121 Ill. 91.

When a deed of trust given to secure a debt is released through mistake or fraud, a subsequent incumbrancer can not obtain a prior lien. Barbour v. Mortgage Co., 102 Ill. 121; Campbell v. Trotter, 100 Ill. 281; Miller v. Wack, Sax. 204; Trenton Bkg. Co. v. Woodruff, 1 Gr. Ch. 117; Garwood v. Eldridge, Id. 145.

The payment of negotiable paper secured by mortgage without demanding the production of the notes is such negligence that if loss accrues thereby the courts will place such loss upon the parties making such payment. Keohane v. Smith, 97 Ill. 156; Cooley v. Willard, 34 Ill. 68; Windel v. Bonebrake, 23 Fed. Rep. 165.

All deeds, mortgages and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice, until the same shall be filed for record. Hurd's R. S., Ill. (1897), Chap. 30, "Conveyances," Sec. 30.

Deeds, mortgages and other instruments of writing relating to real estate, shall be deemed, from the time of being filed for record, notice to subsequent purchasers and creditors, though not acknowledged or proven, according to law. Ibid., Sec. 31.

Ogle v. Turpin, 102 Ill. 148, is a case of reliance on the release as well. The court said:

"The ruling of this court has been, under our recording laws, that a purchaser or incumbrancer may rely on and be protected by a clear and regular title of record."

MR. PRESIDING JUSTICE WINDES, after stating the case as above, delivered the opinion of the court.

Appellant argues, first, that the release deed was not void

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because it was never delivered to Mr. and Mrs. Thomas; second, that appellant is not chargeable with notice of Schintz's fraud; third, that the neglect of appellant to examine the records is immaterial; fourth, that appellant is entitled to the rights of a purchaser for value without notice; and, fifth, that the registry laws, the principles of equity, and the interests of public policy combine to give appellant the prior lien.

As to the first contention, we think it is clearly apparent from the evidence, that in making and recording the release Schintz acted for Mr. and Mrs. Thomas; that it was their intention that the release should be made, and that when it was executed by Schintz and placed of record it became a complete deed as to them to all intents and purposes the same as if Schintz had delivered it into their hands and they had thereafter directed him to place it on record. *Price v. Hudson*, 125 Ill. 284-6; *Bovee v. Hinde*, 135 Ill. 137; *Provart v. Harris*, 150 Ill. 41-8; *Miller v. Meers*, 155 Ill. 291-3.

In the last case the court approves and quotes from the *Price* case, *supra*, viz. :

"Any disposition made of the deed by the grantor, with the intention thereby to make delivery of it, so that it shall become presently effective as a conveyance of a title, will, if accepted by the grantee, constitute a sufficient delivery. (Citing cases.) The intention to deliver on the one hand, and of acceptance on the other, may be shown by direct evidence of the intention, or may be presumed from acts or declarations, or both acts and declarations of the parties, constituting parts of the *res gestæ* which manifest such intention."

Mr. and Mrs. Thomas understood there was to be a release, and Schintz told them he would attend to it; that he would get the old trust deed released, and that they had nothing to do but pay the money. They left the whole matter to Schintz to manage, and there is no doubt but that he intended that the release should be a perfect deed, and that was what they desired. It is true, they expected that the notes secured by the trust deed should be paid, but that was left to

Schintz. He carried out their and his intention as to the release, and that was sufficient. It is immaterial, so far as concerns the validity of the deed as between them, that he failed to pay Mann.

Second. As to whether appellant is chargeable with notice of Schintz's fraud in releasing the Mann trust deed, will depend upon whether Schintz was appellant's agent. It can not be said that Schintz was appellant's agent to examine the title. The title was not examined, and appellant went to Schintz to buy the notes and mortgage because he had them for sale. Appellant asked Schintz if the mortgage was a first mortgage, and Schintz told him that it was. Appellant had no attorney, and did not search the records himself, nor have any one do so. He never did any business with Schintz before and did not afterward, except that he sent the first interest note to Schintz and received from him a check for the amount of the note.

We can see no difference between their relations and those of any other purchaser and seller of a mortgage security, beyond the fact that Schintz had theretofore been the attorney of appellant's employer, the Brewing Association, which we regard as of no significance as tending to establish agency. Did Schintz become appellant's agent because he was the trustee in the deed of trust securing the notes purchased by appellant? He became the trustee in this deed September 15, 1896, the day it was recorded, if not before. Appellant first did business with him October 14, 1896, and as we have seen, there was no basis for such agency up to the time of the purchase of the notes by appellant. If Schintz then became the agent of appellant, he became such when the notes were purchased by appellant and not before.

To make appellant chargeable with Schintz's knowledge in this case, Schintz must have been his agent before the purchase was complete. If, however, it may be said Schintz was in any sense appellant's agent, he was acting in his own interest and against appellant's. An agent's knowledge is not constructive notice to the principal when the agent is

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dealing in his own interest with the principal and against the interest of the latter. *Higgins v. Lansingh*, 154 Ill. 301; *Seaverns v. Pres. Hospital*, 173 Ill. 414.

In the *Higgins* case, *supra*, it was held that when the president of a corporation, having knowledge of infirmities of his title thereto, sold it securities, his knowledge was not notice to the corporation—that he was a stranger to the corporation. In the *Seaverns* case, *supra*, the same doctrine is announced as an exception to the general rule that knowledge of the agent is imputed to the principal, and it was held that the knowledge of the president of a corporation, being a member of a firm of real estate agents who were negotiating a loan to the corporation, was not to be charged to the corporation. The court quotes from the *Higgins* case, viz.:

“His interest (the president’s) is opposed to their’s (the corporation’s), and the presumption is, not that he will communicate his knowledge of any secret infirmity of the title to the corporation, but that he will conceal it,” and further say: “Here the president was negotiating the note and mortgage to the defendant in error, and he stands, under the authorities, as a stranger to the hospital, and must be held not to represent it in the transaction so as to charge it with the knowledge which he may have possessed but did not communicate to it, and which it did not know.”

Schintz well knew that if he communicated to appellant his fraudulent intent and the fact that the notes secured by the Mann trust deed had not been paid, appellant would not purchase. To keep silent would be in his interest and against appellant’s interest. We therefore think he occupied the same position relatively to appellant that the president did to the corporation in the two cases, *supra*.

Third. That the neglect of appellant to examine the records before purchasing is wholly immaterial, is, we think, plain. The only information which an examination of the records would have given him, was that the Mann trust deed was released of record, and the trust deed securing the notes he desired to purchase was a first lien. This knowledge he obtained from Schintz, and that was true so far as appeared from the records.

The fourth and fifth contentions of appellant will be considered together. These contentions present the question which of two equally innocent and confiding holders of securities secured by separate trust deeds to the same trustee, under the facts above stated, shall have priority. We can not, for lack of time, attempt to follow counsel on either side in a discussion of the multitudinous propositions advanced and cases cited by them on this question. An examination of every case cited by either counsel will show some fact which will distinguish it from the case at bar, though the language of the court in many of the cases might seem to strongly favor the view of the counsel citing it. We will not undertake to review them, but refer especially to *Insurance Co. v. Eldredge*, 102 U. S. 545; *Peters v. Bain*, 133 U. S. 696; *Myers v. Ross*, 3 Head (Tenn.), 59; *Ely v. Scofield*, 35 Barb. 330; *Vannice v. Burgen*, 16 Ia. 555; *Home Savings Bank v. Bierstadt*, 168 Ill. 618, cited by appellee, and *Williams v. Jackson*, 107 U. S. 478; *Wilson v. Park Comm'rs*, 70 Ill. 46; *Walton v. Follansbee*, 131 Ill. 147; *Kigour v. Guckley*, 83 Ill. 109; *Barrett v. Hinkley*, 124 Ill. 46; *Himrod v. Gilman*, 147 Ill. 293; *Humble v. Curtis*, 160 Ill. 193; *Burt v. Batavia, etc., Co.*, 86 Ill. 66; and *McAuliffe v. Reuter*, 166 Ill. 491, cited by appellant, and especially relied upon to establish their respective contentions.

In *Barbour v. Scottish Am. Co.*, 102 Ill. 121, in which it was claimed that a trustee, without authority of the holder of notes secured by it, had released a trust deed, and that a subsequent incumbrancer, relying thereon, could not obtain a prior lien, the court said: "If the deed of trust was released by Welsh (the trustee) without any authority from Barbour (the holder of the note), and the act was never sanctioned or ratified by him, it is apparent that the Mortgage Company (the junior incumbrancer) could not hold the property as against complainant's deed of trust (the one released)." A reading of this case shows that this language of the court was unnecessary to a decision of the case, because the court held the proof showed that the

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holder of the notes secured by the senior trust deed had authorized its release, and even if it was not authorized, his subsequent acts ratified it. The notes secured by the released trust deed had not matured at the time of the release. In *Stiger v. Bent*, 111 Ill. 328-40, in which the court states, "The real contest here is, whether the payment by Stiger (a subsequent purchaser) to Davis (the trustee in the deed sought to be foreclosed), and the entry of satisfaction by Davis on the record of the deed of trust, released the land from the operation of that deed, so far as Stiger and those claiming under him are concerned," and refers with approval to its decision in the *Barbour* case, *supra*, reciting, however, the whole substance of the decision. The court also refers to the *Eldredge* case, 102 U. S. 545, *supra*, as stating the law that an unauthorized release has no effect upon the trust deed as to "subsequent purchasers with notice," and said: "It is claimed here, however, that Stiger was not a purchaser with notice, and upon the solution of this hinges the present question." The court held that as Stiger refused to purchase unless he could pay off the trust deed, and applied to the trustee for that purpose, and the record of the deed of trust informed him, before the entry of satisfaction, that the note, which was overdue, was not payable to the trustee, but to Bent, and was negotiable by indorsement, and as he did not require its production and cancellation, he was not an innocent purchaser.

In *Land Co. v. Peck*, 112 Ill. 443, it was held, citing the *Barbour* case, *supra*, and *Stanley v. Valentine*, 79 Ill. 544, as authority, that releases of trust deeds which were executed and placed in escrow by the trustees to be recorded on the performance of certain conditions, and which were recorded in violation of such conditions and without the assent or knowledge of holders of bonds secured by the trust deeds, whose bonds had not matured when the releases were recorded, were inoperative as against the bondholders. The court say: "It is very true that those subsequently acquiring interests in the property, were liable to be misled and take the premises to be unincumbered by these trust

deeds, from these releases appearing of record; but we do not see that it was in any way from the fault of the bondholders, or that there has been any conduct of theirs which should visit them with the loss of their security." It does not appear from the opinion that there were any innocent subsequent purchasers or incumbrancers and the bonds had not matured.

In a number of cases it has been held that it is not the usual care which an ordinarily prudent person observes in the transaction of his business, to pay off a note and take a release from the mortgage before its maturity without seeing or taking up the note or making any inquiry as to whether the mortgagee is still the holder of the note. *Windle v. Bonebrake*, 23 Fed. R. 165; *Skeele v. Stocker*, 11 Ill. App. 144; *Keohane v. Smith*, 97 Ill. 160.

In two of the cases, *Barbour and Peck, supra*, the securities had not matured, and in the *Stiger case, supra*, *Stiger* was held to be chargeable with notice for other entirely sufficient reasons, though the paper had long passed maturity when the release was made. We therefore think that these facts distinguish these cases from the one at bar.

Our recording act has the following provisions, viz.:

"All deeds, mortgages, and other instruments of writing, which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record." *Hurd's R. S., Ill. (1897), Chap. 30, Sec. 30.*

"Deeds, mortgages and other instruments of writing relating to real estate, shall be deemed, from the time of being filed for record, notice to subsequent purchasers and creditors, though not acknowledged or proven, according to law." *Ibid, Sec. 31.*

There being no circumstance shown by this record which would tend to establish that appellant was chargeable with notice of *Schintz's* fraud, and the note held by appellee being overdue, we think he was entitled to rely upon the records as they appeared at the time he purchased his secu-

Metropolitan West Side El. R. R. Co. v. Kersey.

rities. Schintz had the power to release the Mann trust deed when the notes were paid. The notes had matured and Schintz had made and recorded the release before appellant saw him with regard to the purchase. Appellant had the right to rely upon the record, which said, in effect, that the notes secured by the Mann trust deed had been paid—they then being overdue. We think it immaterial that he did not actually see the record showing the Schintz release, because he had received that information, in effect, from Schintz, and could have learned no more from a personal search of the records.

If appellant is to be deprived of a first lien by reason of Schintz's fraud, because appellee was equally innocent with him, then the recording laws of the State are of little avail to a subsequent incumbrancer who, in loaning his money, relies upon the records. Before he can be protected from fraudulent releases, he must, at his peril, inquire as to the payment of securities, however long past maturity at the time of the release. There would seem to be no especial hardship in a rule of decision making it incumbent on him to inquire in case of release before maturity of the debt as shown by the record, or trust to the honesty of the trustee making the release.

The decree will be reversed, with directions to the Superior Court to enter a decree giving appellant a first lien and appellee a second lien on the premises in question. Reversed with directions.

**Metropolitan West Side El. R. R. Co. v. Annie Kersey,
by her Next Friend, etc.**

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1. **NEGLIGENCE—Of Person in Charge of a Child Not to be Imputed to the Child.**—Where the negligence of a man standing upon a street car platform with a child contributed to the child's injury, his negligence can not be imputed to the child to bar her a recovery, based upon the negligence of the railway company.

2. **DAMAGES—When \$2,000 is Not Excessive.**—Where a five-year-old

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child received an injury consisting of a simple fracture of the thigh bone, and the limb, after being kept in a plaster cast and held by stirrup and weights for four or five weeks, was permanently shortened to a slight extent, and after two years still caused pain and weakness in the limb, \$2,000 is not excessive.

Action on the Case, for personal injuries. Error to the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Verdict for plaintiff. Appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed February 28, 1899.

The plaintiff in error herein, at the time of the injury in question, was a common carrier of passengers and operated a system of elevated railroad lines through the city of Chicago. On December 18, 1895, the defendant in error, Annie Kersey, at that time of the age of five years, was in charge of William and Jessie Garth. They had been spending the evening with some friends and were on the elevated platform at Marshfield avenue station for the purpose of transferring from the main line to the branch line. A train consisting of a motor car and trailer approached and stopped, and the gate was opened by the guard to admit passengers. It was a stormy, rainy night, and the platforms of the cars were wet. Mr. Garth, who had the child by the hand, got on the platform of the trailer; the child followed him. While they were still on the platform, and before they had entered the car, the guard closed the gate and gave the signal to go ahead. In order to enter the motor car it was necessary to step upon the front platform of the trailer and then step over the space between that car and the motor car on to the rear platform of the motor car.

There is some dispute as to the exact manner and order of entering the train by the party. But it is undisputed that Garth and the child, defendant in error, were still upon the front platform of the trailer and in the act of crossing over to the motor car when the train started. As they crossed over, the defendant in error fell between the two cars to the structure below and was injured. It is also undisputed that the guard or conductor, who gave the signal to start, was aware of the presence of Garth and the child

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upon the platform, when he caused the train to start forward.

As to whether the train started in the ordinary manner or with an unusually sudden and violent jerk, is controverted. There was evidence tending to show that as the train started the space between the cars was widened upon the side where Garth and defendant in error were undertaking to cross, and that this widening of the space upon that side was caused by a curve in the tracks.

The first count of the declaration alleged that the defendant negligently caused the train to start with a sudden and violent jerk while the plaintiff was on the platform of the train, and before she had entered a car, thus causing her to fall between the two cars.

The second count of the declaration alleged that while she was passing from one platform to the other, the defendant carelessly and negligently started the train, and plaintiff was precipitated between the ends of the cars and upon the structure beneath.

The trial resulted in a verdict for defendant in error, by which her damages were assessed at \$2,500. After a remittitur of \$500, judgment was entered upon that verdict.

IRA C. WOOD and ADDISON L. GARDNER, attorneys for plaintiff in error; W. W. GURLEY, of counsel.

J. WARREN PEASE, attorney for defendant in error.

MR. JUSTICE SEARS delivered the opinion of the court.

If it may be declared by a jury to be negligence to start a train under the circumstances here surrounding, while a passenger of tender years was known to be still upon the platform of the car and had not yet entered the car, but was proceeding so to do, then under the second count of the declaration the evidence clearly sustains the verdict. Petrie, who was conductor of the train and stood upon the platform in question, testified:

“After I closed the gate I turned to the trailer car to announce to the passengers the next station. Before that I

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had rung the signal to go ahead, and the train had started. The door of the trailer car was open. All the passengers were not seated. There were some standing up. There was no passenger standing inside the coach, only this lady that got on. The man and the little girl were on the platform. I knew there was a man on the platform with a little girl, holding the little girl's hand. I didn't turn around to observe where they were going or what they were doing. I looked due south to see that nobody else got on the train. I didn't just at that time look around to see what that man and the little girl were doing. I knew they were standing there on the coach platform, next to me. It was a rainy, drizzly night; not such a night that people stand out on railroad platforms with little girls. I thought he was going to try to get into some car. I knew he had not got into any car; that he was still standing on the platform. He was standing back of me; I didn't look at the time to see whether he was moving or not. After I had called the name of Madison street as the next station, then I turned and then is when I caught a glimpse of the little girl falling. * * * The man had not had time to go in the train."

The testimony of this witness, who was called by plaintiff in error, was uncontroverted.

We can not say that the jury were not warranted by the evidence in finding that the plaintiff in error, through its conductor, was guilty of such a lack of care in relation to defendant in error, its passenger, as made it liable for the injury which resulted. *C. & A. R. R. v. Arnol*, 144 Ill. 261; *N. C. St. R. R. v. Cook*, 145 Ill. 551; *W. C. St. Ry. Co. v. Craig*, 57 Ill. App. 411.

The negligence of Garth, if he was negligent, can not be imputed to defendant in error to bar her from a recovery based upon negligence of plaintiff in error. *Chi. C. Ry. Co. v. Wilcox*, 138 Ill. 370.

The jury were warranted by the evidence in finding that his negligence, if any, was not the proximate cause of the injury to defendant in error, but that the negligence of plaintiff in error was such proximate cause. Nor can any contributory negligence be attributed to this child of five years of age by reason of her own conduct. *The C., St. L. & P. R. R. Co. v. Welsh*, 118 Ill. 572; *Chi. W. D. Ry. Co. v. Ryan*, 131 Ill. 474.

The only complaint as to matters of procedure are directed to the refusal of the trial court to strike out an answer by the witness, Lanfield, and the giving of the first, second and third instructions tendered by the counsel for defendant in error.

The answer of the witness to which objection was made, was as follows: "They rang the bell and the car went and gave such a terrible jerk." It is true that the description would give no very precise information to the jury as to the suddenness and violence of the jerk, but it was explainable and was explained upon further examination. We do not regard the refusal of the court to strike it out as reversible error.

The instructions noted are objected to because they do not present to the jury the questions of contributory negligence and proximate cause.

No question of contributory negligence was involved, and neither litigant requested any instruction touching contributory negligence. The plaintiff in error tendered sixteen instructions, all of which were given as presented, and they very fully and clearly informed the jury that there could be no recovery if the injury was not caused by negligence of plaintiff in error, but was caused by negligence of Garth or by any other cause. In other words the jury were directed that there could be no recovery unless negligence of plaintiff in error was the proximate cause of the injury. We find no error in the instructions.

It is urged that the damages are excessive. The injury consisted of a simple fracture of the thigh bone. In treatment the limb was kept in a plaster cast and held by stirrup and weights for four or five weeks. There is a permanent but very slight shortening of the limb—about a quarter of an inch in extent. The mother of the defendant in error testified that at the time of the trial, more than two years after the injury, the child was still troubled by pain and weakness in the limb.

We can not say that the judgment is excessive in amount. The judgment is affirmed.

**Anthony J. Schneider, by his Next Friend, v. North
Chicago St. R. R. Co.**

1. **ORDINARY CARE—Defined.**—Ordinary care is that care which a reasonably prudent and cautious person takes to avoid injury under like circumstances.

2. **ARGUMENTS BEFORE THE JURY—Limitation Must be Reasonable.**—The discretion exercised by the trial judge in limiting the time of the argument before the jury must be reasonable. If the time is so limited as practically to prevent a presentation of the case made by the evidence, it will be unreasonable and an abuse of judicial discretion.

3. **INSTRUCTIONS—Failure to Exercise Ordinary Care.**—An instruction which requires the jury to find, in order to entitle the plaintiff to recover, (1) negligence of the defendant causing the injury; and (2) ordinary "precaution, forethought and care" on the part of the plaintiff, and tells them that if the accident happened by reason of plaintiff failing to exercise such ordinary care, he can not recover, is not erroneous in view of the undisputed facts of this case.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the HON. PHILIP STEIN, Judge, presiding. Verdict and judgment for defendant; appeal by plaintiff. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed February 14, 1899.

Appellant sues to recover for personal injuries. He undertook to board an open electric car which had stopped to receive passengers. The footboard running along the outside of the car was, it is alleged, occupied by passengers standing thereon. Appellant crossed the track in front of the car and got upon the footboard on the inner side, next to the adjacent track used for north-bound cars. At the time he crossed he saw a north-bound car which was approaching on said track and was then, he says, about two hundred feet away. While standing on the footboard he was struck on the back of his head by this north-bound train, knocked off the car upon which he had been standing, and fell to the ground in its rear. He seeks to recover for injuries claimed to have been thus inflicted. He is said to suffer from headaches and dizziness, which are alleged to

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have been caused by the accident. The jury found the issues for the defendant.

FRED H. ATWOOD and FRANK B. PEASE, attorneys for appellant.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

There is controversy as to certain matters of fact. It is claimed for plaintiff that he was struck while in the act of getting into the south-bound car. The defendant asserts that he had gotten on safely, and was struck by the passing north-bound car while he was swinging out in front of it in the act of moving along the footboard. There is also controversy as to whether the headaches and dizziness complained of are the result of injuries thus received.

The testimony as to how the accident occurred, while somewhat conflicting, is not very decidedly so as to material points. It is evident that the plaintiff did swing back and outside the line of the side of the car, because otherwise he could not have been struck, and it is not seriously important whether he did this in the mere effort to step up from the footboard into the car in order to get a seat, or in the effort to pass around from one row of seats to another. The question here is, whether he was injured by any negligence of the defendant while himself in the exercise of ordinary care.

It is urged by appellant that the appellee was negligent "when the motorman on the north-bound car saw the boy in the act of getting on the car, to run by at any such speed as he must have passed, in order to have inflicted these injuries." But was there anything shown by the evidence, in the position or attitude of the boy as he stood on the footboard, to indicate that he would project his head and part of his body in front of the advancing car at the moment of passing? The evidence indicates that he was

not standing in such a position for any length of time, but that the act was sudden, instantaneous; and there is evidence which tends to show that the speed of the car was only the usual and ordinary rate. There was nothing, so far as appears from the evidence, to charge the motorman of the north-bound car with notice that the boy was about to place himself in a dangerous position "long enough before the injury inflicted to have enabled him to have formed an intelligent opinion as to how the injury might be avoided and apply the means." *C., B. & Q. R. R. Co. v. Johnson*, 103 Ill. 512; *Theobald v. C., M. & St. P. Ry. Co.*, 75 Ill. App. 208.

Appellant's counsel urges that the plaintiff was not guilty of any want of ordinary care in a boy of his age and discretion. He was fifteen years of age. It is not claimed that he was less than ordinarily intelligent. Whether he was exercising ordinary care, is a question of fact. Ordinary care is defined as being that care which a reasonably prudent and cautious person would take to avoid injury under like circumstances. The burden is on the plaintiff to show due care. *N. C. St. R. R. Co. v. Conway*, 76 Ill. App. 621, 626.

We find no sufficient reason in the evidence to interfere with the finding of the jury upon the questions of fact. The plaintiff was on the wrong side of the car, and saw the north-bound train approaching long before he was struck. The jury were warranted in concluding that the evidence did not justify them in finding that there was negligence on the part of the defendant, causing the accident.

It is urged that the trial court erred in limiting the time of the argument before the jury to fifteen minutes upon each side. The discretion thus exercised by the trial judge must be reasonable. If the time had been so limited as practically to prevent a presentation of the case made by the evidence, such limitation would be unreasonable and an abuse of judicial discretion. But such was not the case here. The points of controversy were not numerous nor difficult of comprehension, and we are of opinion that all

necessary and legitimate argument of the questions arising under the evidence could be fully presented in the time allowed.

The court refused to allow the introduction of certain photographs offered in evidence. In this no error was committed. The photographs in question could not throw light upon any controverted point, and the evidence was not material. A picture of the place of the injury, showing the street and sign post and tracks, was of no value as evidence in this case.

We regard some parts of the testimony given by the physician called by the defendant, as of doubtful propriety, but evidently not harmful, and there is no suggestion that it was.

Objection is made to the first instruction given in behalf of the defendant. It required the jury to find, in order to entitle the plaintiff to recover, first, negligence of the defendant causing the injury; and, second, ordinary "precaution, forethought and care" on the part of the plaintiff; and told them that if the accident happened by reason of plaintiff failing to exercise such ordinary care, he could not recover.

We find no fault with the instruction in view of the undisputed facts of this case. Before the accident the plaintiff had gone around in front of the south-bound car, and had gotten upon its footboard on the side next to the advancing north-bound car, which he saw. At the time of the accident he was swinging his head and body out in front of the advancing car. We regard the facts, therefore, as removing any objection, based upon *W. C. St. R. R. v. McNulty*, 166 Ill. 203, which might be urged to the form of the instruction complained of.

Objection is made to the modification of certain instructions requested for the plaintiff, by inserting the words, "if any," referring to the injury, damages and negligence. That the plaintiff was somewhat injured is not disputed, and a qualification as to injury was unnecessary. But the question of whether he was entitled to recover damages was an issue in the case. So also as to the question of neg-

ligence of the defendant. The question of his having been injured was important only, if in consequence of such injury he was entitled to recover damages.

The instructions relating to the duties of common carriers, while stating correct propositions of law, were not applicable in this case under the evidence.

The judgment of the Superior Court must be affirmed.

Abraham Harris v. Isaac Harris.

1. **CONSIDERATION**—*Note Given by a Son at His Father's Request.*—A note given by a son at his father's request, for the father's existing debt, and made payable at a future day, is not void for want of consideration.

2. **SAME**—*Extension of Time, etc.*—An extension of time for the payment of a debt or the performance of an agreement is a sufficient consideration to support a contract.

3. **SAME**—*Suspension of the Right to Enforce Payment.*—A suspension of the creditor's right to enforce payment of his debt is a sufficient consideration for the promise of a third person to pay it.

Assumpsit, on a promissory note. Trial in the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed December 28, 1898.

JOHN B. BRADY, attorney for appellant.

SAMUELS & SELIGMAN, attorneys for appellee, contended that a debt due from a third person, as from A to B, is a good consideration for a note as from D to B, provided there was an express agreement for delay, or an implied agreement which would arise if the debt were then due and the note were made payable at a future day. Daniel on Negotiable Instruments, 3d Ed., Sec. 185.

In general, a note payable in future, for a debt of a third person already due, amounts, as we have seen, to an indul-

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gence as to the latter debt, and has in that a sufficient consideration. Randolph on Commercial Paper, Vol. 2, Sec. 466.

A subsisting debt due from a third person is a good consideration for a bill or note payable at a future day. Byles on Bills, 128.

See also Popplewell v. Wilson, 1 Strange, 263; York v. Pearson, 63 Me. 587; 1 Parsons on Notes and Bills, second edition, p. 195; Underwood v. Hosack, 38 Ill. 208; Daniel on Negotiable Insts., Vol. 1, Sec. 185; Thompson v. Gray, 63 Me. 228.

The promissory note of a married woman, given for the antecedent debt of her husband, is not void for want of consideration, if it is made payable at a future day. Such a note necessarily operates as a suspension of the right of the creditor to enforce payment of his debt until the note matures. Thompson v. Gray, 63 Me. 228.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is an action upon a promissory note made by appellant payable to appellee.

At the time the note was delivered, appellant, according to the evidence, held in his own name "all the property" belonging to his father, Moses Harris, who was indebted to appellee. At the request of his father, appellant made and delivered this note for the exact amount of that indebtedness. He now contends that he ought not to pay it because he says, it was without consideration, was merely accommodation paper, and that it was not given or received in satisfaction of the debt of Moses Harris to the appellee.

The debt from Moses Harris to appellee was due. The note in controversy was payable eight months after its date. It was given for the father's existing debt at the father's request, the latter promising to pay it. Such a note is not void for want of consideration, when payable at a future day, as in this case. It operated as a suspension of the right of appellee to enforce payment of his debt against

Moses Harris until eight months thereafter. Forbearance is a sufficient consideration. *Mulholland v. Bartlett*, 74 Ill. 58, 61.

“All of the authorities agree that an extension of time for the payment of a debt, or the performance of an agreement, forms a sufficient consideration to support a contract.” *Underwood v. Hosack*, 38 Ill. 208, 214.

When the debt of the third person is due, and the note is made payable at a future day, an agreement for delay is implied. *Daniel on Negotiable Instruments*, Vol. 1, Sec. 185.

In *Parsons on Notes and Bills*, Vol. 1, Chap. 6, second edition, p. 195, the author says: “A debt from a third person is in general a good consideration for a note. It certainly would be so if a delay in calling in the debt entered expressly into the bargain. Perhaps if the debt were payable at once, and the note payable at a future day, or if both were payable in future and the note on the longest time, such agreement for delay would be implied.”

In *Thompson v. Gray*, 63 Me. 228, 230, it is said: “The promissory note of a married woman given for the antecedent debt of her husband, is not void for want of consideration if it is made payable at a future day. Such a note necessarily operates as a suspension of the right of the creditor to enforce payment of his debt till the note matures; and it is a rule of law, too well settled to require the citation of authorities in support of it, that such a suspension of the right of the creditor to enforce payment of his debt is a sufficient consideration for the promise of a third person to pay it. It is not necessary that there should be an express agreement for delay. The taking of a new security, payable at a future day, by operation of law, and without any special agreement to that effect, imposes upon the creditor the duty of waiting for his pay until the security matures.”

The judgment of the Superior Court is affirmed.

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Franklin Printing and Publishing Co. v. Matilda Behrens.

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85	596
181	340
80	313
91	494

1. **PERSONAL INJURIES**—*In Elevators—Prima Facie Case.*—In an action for personal injuries received in an elevator, evidence that the injury was caused by the careless and negligent operation of the elevator, the plaintiff being lawfully in it, is sufficient to sustain a recovery.

2. **PLEADING**—*Special Damages, Special Averments Not Necessary.*—Damages resulting from an accident to a passenger in an elevator, such as injuries to an arm or leg, are not special; they are the direct and natural result of the injuries and such as the law implies, and therefore need not be specially averred.

3. **DAMAGES**—*Under the Allegation Alia Enormia.*—In trespass, under the allegation *alia enormia*, damages which naturally arise from the act complained of, or which can not be decently stated, may be given in evidence in aggravation of damages, though not specified in the declaration.

4. **PLEADINGS AND PROOFS.**—The court is of the opinion that, under the allegations of the declaration in this case, it was competent to prove any physical injuries, mental impairment or suffering, which were the direct result of the negligence charged.

Action for Personal Injuries.—Trial in the Circuit Court of Cook County; the Hon. CHARLES E. FULLER, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed March 16, 1899.

JOHN A. POST and JOHN B. BRADY, attorneys for appellant.

JOHN C. RICHBERG, attorney for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellee was plaintiff, and appellant defendant, in the trial court. The declaration contains two counts, in the first of which the averments are, in substance, as follows:

Defendant was the owner of the building numbered 341-351 Dearborn street, in the city of Chicago, and rented the several floors thereof to sundry persons for their business purposes. Defendant maintained in the building an elevator and operated the same by its servants between the several floors of the building, for the conveyance of such

persons from any one of said floors to another. Plaintiff, February 25, 1895, while in the exercise of due care and caution for her safety, presented herself at the entrance to the elevator on the sixth floor to be carried thereon to the main floor, and was received into the elevator.

“Nevertheless the said defendant company, regardless of its duty in the premises, negligently, carelessly and improperly entrusted the management of said elevator to a careless and incompetent servant, and the said defendant company by its servants so carelessly, negligently and improperly controlled and operated said elevator, that by and through such carelessness, negligence and improper conduct, said elevator, just as it reached the said main floor and the door was opened for the plaintiff to step from said elevator on said main floor and was in the act of making her exit, was started upward, and before the plaintiff could safely make her exit; that by means of the sudden starting of the said elevator upward the said plaintiff was caught and crushed in the opening of said elevator, and crushed against the top cross-piece of the said elevator being at said main floor; and by means whereof the said plaintiff was then and there greatly bruised, wounded and lacerated, and sustained permanent and lasting injuries to her neck, jaw and spine, and her nervous system was greatly shocked, and her upper teeth knocked out, and the plaintiff was otherwise greatly bruised, wounded and injured, and also by means of the premises, the plaintiff became sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto,” etc.

The second count, after averring appellant's ownership of the building and the maintenance and operation of the elevator, and the receiving of the plaintiff therein at the sixth floor, substantially as in the first count, contains the following:

“And immediately thereupon, when said defendant company undertook to transport or lower the said plaintiff from said upper floor of their said building, the said elevator or hoist by reason of the broken, insecure and insufficient machinery by which the same was run, and by reason of the careless and negligent conduct of the defendant company in the care of the machinery, and in the running and operating of the same, and in the running and operating of the said elevator or hoist, without any fault

or negligence on plaintiff's part whatsoever, the said elevator or hoist upon reaching the said street floor, and while the door of said street door shutting in said elevator was opened for plaintiff's egress and she was in the act of making her exit with all due care and caution, said elevator or hoist, without any warning to the plaintiff, suddenly started and shot upward, by means whereof the plaintiff was caught in the opening of said elevator or hoist, and with great violence crushed and struck against the upper casing of the doorway upon said street floor, and was knocked down and her face and head jammed between the floor of said elevator and the said casing, or cross-piece, and the plaintiff was thereby greatly bruised," etc. It is further averred in this count: "That the plaintiff at the time aforesaid, had no notice or knowledge that the machinery whereby the elevator or hoist was run or operated was out of order, or broken, or insecure, or that the elevator was operated or run by an insufficient, incompetent, careless and negligent servant, and the defendant company had full notice and knowledge thereof," etc.

Appellant pleaded the general issue, the jury found appellant guilty and assessed appellee's damages at the sum of \$15,000; appellant's motion for a new trial and in arrest of judgment was overruled, and judgment was entered on the verdict.

Appellant's counsel, in their argument, object that there was a fatal variance between the allegations and the evidence, and that the plaintiff's evidence failed to show that the machinery by which the elevator was operated was insufficient or unsafe, or that the servant of appellant, who was operating the elevator at the time of the accident, was incompetent; that the preponderance of the evidence is that the machinery was sufficient and the operator competent; that certain evidence of injuries to the appellee was improperly admitted, because not alleged in the declaration; that the damages are excessive, and that the court erred in not taking the case from the jury at the close of plaintiff's evidence, and, again, at the close of all the evidence.

At the conclusion of appellee's case in chief, counsel for appellant moved the court to exclude from the consideration of the jury the first count of the declaration, because

of an alleged variance between the count and the evidence, alleging as reasons therefor, that the only place in which it was alleged that the plaintiff was in the exercise of due care, was at the time she presented herself at the entrance to the elevator on the sixth floor; that there was no proof that the elevator was entrusted to a careless and incompetent servant; or that it was carelessly operated; or that it was started upward as appellee was in the act of making her exit; or that she was crushed against the top cross-piece of the elevator. The first of the reasons assigned for the motion goes to the sufficiency of the declaration, the remainder to the sufficiency of the proof. The question of variance between allegations and proof is not raised by any reason assigned for the motion, nor does any such variance appear in the record. Counsel base their objection on section 50 of the practice act, namely: "If one or more of the counts of a declaration be faulty, the defendant may apply to the court to instruct the jury to disregard such faulty count or counts," and say their understanding of the section is, that if there is no evidence to sustain a count, the court, on motion, may instruct the jury not to consider it. This is a misunderstanding of the section. A faulty count, within the meaning of the section, is one which does not contain allegations which, even if proved, would sustain a verdict or judgment. We do not think the declaration was materially defective in omitting to aver that the appellee was exercising ordinary care at the exact instant of receiving the injuries complained of. The motion was expressly made on the ground of variance; the reasons assigned show no variance, and the motion was properly overruled.

Counsel also moved to exclude the second count from the consideration of the jury, on the ground that none of the plaintiff's evidence tended to sustain it. Counsel predicated the motion on the proposition that the entire gist of the count was that the machinery of the elevator was defective, insecure and insufficient. We agree with the trial court in dissenting from this proposition. The cause of the accident is averred in the second count thus :

“The said elevator, or hoist, by reason of the broken, insecure and insufficient machinery by which the same was run, and by reason of the careless and negligent conduct of the defendant company in the care of the machinery, and in the running and operating of the same, and in the running and operating of the said elevator or hoist, without any fault or negligence on plaintiff’s part whatsoever, the said elevator or hoist, upon reaching the said street floor,” etc., “suddenly started and shot upward,” etc.

The court contains at least two distinct and independent charges of negligence, either of which is of itself a cause of action; one, the use of broken, insecure and insufficient machinery; the other, negligence in the running and operating the elevator; and while the count may have been obnoxious to special demurrer for duplicity (1 Chitty’s Pl., 9th Am. Ed., 226–228), it by no means follows that it was incumbent on appellee to prove both causes of action to maintain her suit, appellant having pleaded the general issue. Evidence that the injury was caused by the careless and negligent operation of the elevator, the appellee being lawfully in it, is sufficient to sustain a recovery by appellee.

Appellant’s counsel object to certain evidence of appellee as to injuries to her arm and leg, and the effect of her injuries on her hearing and her mental condition, on the ground that such injuries are not specially averred in the declaration. Counsel say these are special injuries (whatever that may mean), and that the damages resulting therefrom are special damages. Damages resulting from such injuries are not special; they are the direct and natural result of the injuries and such as the law implies, and therefore need not be specially averred. 1 Chitty’s Pl. 395. In trespass, under the allegation *alia enormia*, damages and matters which naturally arise from the act complained of, or which can not decently be stated, may be given in evidence in aggravation of damages, though not specified in the declaration. *Ib.* 397. See also *Roberts v. Graham*, 6 Wall. (U. S.) 578. For further illustration of the distinction between general and special damages, see *Olmstead v. Burke*, 25 Ill. 86, *Miles v. Weston*, 60 *Ib.* 361, and *Adams*

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v. Gardner, 78 Ib. 568. We are of opinion that, under the allegations of the declaration, it was competent to prove any physical injuries or mental impairment or suffering, which were the direct results of the negligence charged.

At the close of appellee's case, appellant also moved the court to exclude from the jury all of appellee's evidence, and presented to the court a written instruction to find the defendant not guilty. The motion was overruled and the instruction refused, but appellant waived exception to the ruling in that regard by introducing evidence on the merits. *Gilbert v. Watts-DeGolyer Co.*, 169 Ill. 129.

Appellee was about twenty years of age at the time of the accident, and was employed as a stenographer by the Franklin Engraving and Electrotyping Company, whose place of business was on the sixth floor of appellant's building. Between twelve and one o'clock in the forenoon of February 25, 1895, she took the elevator at the entrance thereto on the sixth floor, to descend to the first or main floor, for the purpose of going out to lunch. Louis Grego, a boy then about sixteen years of age, was operating the elevator. Appellee testified:

"I got into the elevator at the sixth floor and rode down to the first floor, and the elevator stopped and the boy opened the door, and I was just in the act of getting out, when up shot the elevator, and the next instant I felt the bones crushing, and all of a sudden I was free again, and then I seen the elevator boy pull the lever backward and forward, and then we went down to the first floor again. We had gone nearly to the second—I could see the doorway—we had got through to the second floor—and then I was taken out of the elevator," etc. * * * "Nothing occurred between the operator of the elevator and myself from the time that we started from the sixth floor until we got to the main floor. When we got to the main floor the elevator man stopped the elevator and opened the door for me to get out. I was just in the act of getting out—I was just going to step out of the door of the cage—I was looking out of the cage, ready to step down on the floor. There was no one else in the elevator besides myself and the boy. The elevator flew up."

On cross-examination appellee testified:

"The elevator came to a full stop, and then he opened the door for me to step out. I was looking out of the door; did not see him do anything; just stepped out next; was in the act. The next I noticed or knew, the elevator flew up; it flew up like lightning."

Stagemann, a witness for appellee, testified:

"I had some work done for the electrotyping company, and was waiting for the elevator to come down. The door was open and her foot protruded, and after a minute the foot disappeared again and there was an awful outcry, and I ran up to the door and the door was open. I looked up and there was the elevator, just about half way between the floors. Then it came down and I got her in my arms," etc.

Appellee, as was natural, could not testify as to what her body came in contact with, or against what she was crushed when the elevator shot up. This is a circumstance greatly relied on by appellant's counsel. The short distance between the first and second floors—about twelve feet—and the short space of time required for the elevator to ascend nearly to the second floor, and the suddenness of the start upward, were such that had appellee undertaken to state against what she came in contact with, it might well have been relied on as affecting the credibility of her testimony.

The only witness produced by appellant, who testified as to the cause of the accident and the manner in which appellee was injured, was Grego, the elevator boy. The evidence shows that Grego's regular employment was that of office boy, and that he operated the elevator only from twelve o'clock noon, or 12:30 o'clock, till one o'clock P. M., for the purpose of temporarily relieving the regular operator, whose name was Johnson, and that he had been operating it only about a month and a half before appellee was injured.

Grego testified as follows:

"I took her on at the sixth floor. She was the only passenger on the elevator. When I got to about between the third and second floors Mr. Sherwin and two other gentlemen hollered 'Down!' So I never took them down; I went past them, and when we got between the first and second floors there was an iron shaft door that closes evenings and opens in the morning—when he closes down the eleva-

tor and starts it up in the morning. So, finally, between the second and third floors she looked up; and before, when I ran her down from the sixth to the first and from the first up to the sixth, during the noon hours, she always had a habit of getting on the east side of the platform and coming on the west close to the door of the cage, and so I have told her many times to keep away from there, and finally one day—that day—she stuck her toes about two inches or two inches and a half over the edge of the platform, and perhaps—I don't know—the door slides very easily; and at the same time she caught the door, and when she caught it I heard it snap—it has a kind of a snap lock—which may be caught her foot in there. I don't know how it was, but she fell back. She fell back the first time; I thought perhaps she was fooling, so I pulled her up and she fell back on my right arm; I have the lever in my left hand going down and always work it with my left, and, going up, with the right; so the first time I held her up. The first time she fell on the lever hand, and I had the lever in this position—the handle stuck out about an inch and a half—so she fell back and that pressed the lever back, and kind of pushed the lever back so that the elevator goes up about five or ten feet, perhaps eleven; I can not tell exactly how far it went up; so I brought her down to the first floor, and that's just how it was; I don't know anything more of it.”

The following, which occurred in the examination of the witness, indicates that he was merely theorizing as to the cause of the accident:

Q. “Describe that (door) how it projected in there and how it caught her foot. A. The time she got caught this door slid—slides very easily—and the time it slid, it moved—caught her like there you know, and she fell back on me, and that's how it caught. *I couldn't tell you any other way, because I don't know—that is the only way I think it was done.* She fell back on me and then I told her to stand up and quit her fooling, and then she fell back on me the second time and falls onto the handle of the lever.”

The evidence of this witness also indicates that he was descending from the sixth floor rapidly, because he states that he declined to stop at the second floor to take down passengers who were hallooing to him to stop. He, therefore, had but little opportunity to observe the appellee. The door which he refers to in the foregoing testimony is

not a door in the elevator, but outside of it, in the shaft, on the first or main floor, and which can be opened by one inside of the elevator. It is thus described by one of appellant's witnesses :

"The door is of corrugated sheet iron. It is probably one-twentieth or one thirty-second of an inch thick. The upper part of it lays close to the elevator on the west side. When it is raised it is some distance above the opening. When you walk into the elevator cage or walk out, it is above you. In pulling it down you have to catch it from the bottom with your hands. The lower part of it rests in two slides down below the car, below the main floor, running into the basement. The lower part of the corrugated door is not observable when you step into the elevator cage from the street entrance, only the top of it. The top of it is exactly flush with the floor."

Another of appellant's witnesses testified that the door consisted of two parts, that one of the parts slid up and the other down; that they run on cranks with a balance attachment; that they can be brought together very easily, and that on the top of the door is an iron flange about one and one-half inches in width, extending clear across the top, and that the distance from the elevator, well out to the door, is two or two and one-half inches. The evidence also shows that when the top part is pulled down, the lower part, at the same time, moves up, and that the two parts meet and become fastened. Grego testified that there is a space of four or five inches between the shaft and the elevator. Now, if there is a space of four or five inches between the shaft and the elevator, and if the main door is two or two and one-half inches from the elevator, and the flange on top of the door only one and one-half inches wide, leaving about three-quarters of an inch extension on each side of the door, and appellee's foot extended from the edge of the elevator platform one and one-half inches, as Grego said at one time, or two or two and one-half inches, as he said at another time, it is difficult to understand how appellee's foot pressed against the upper flange of the door. In his examination in chief, Grego testified: "The door slides very easily,

and, at the same time, she caught the door, and when she caught it I heard a snap; it has a kind of snap lock which, *may be*, caught her foot in there," evidently intending to be understood that the sliding door came together. In his cross-examination he says:

"The iron slides easily up and down. Any pressure on top of the iron door would make it come down, unless it would get caught some different way. The sliding door went down about two or three feet." Q. "Two or three feet?" A. "Yes, sir. Went down, and she must catch, you know, and when it did catch I suppose she jumped. I don't know how it was myself. I could not explain the rest."

* * * Q. "Didn't you say it come down two or three inches?" A. "No, sir." Q. "Or a short distance?" A. "I said about two or three feet at first, and then I said it snapped." Q. "You say it snapped, do you?" A. "Yes, sir." Q. "When?" A. "At the time the door closed."

If the two parts of the iron door of the shaft came together with a snap, they would have locked automatically, as the evidence shows, but Stagemann testified that when he looked up the door was open.

For the purpose of contradicting or impeaching the testimony of Stagemann, appellant's counsel put in evidence the following written statement signed by him February 27, 1895:

"Following statement of accident, as far as witnessed by myself, sustained by Miss Behrens, in the elevator running in the Conkey building: Entering the door at about 12:45 P. M., on Monday, February 25, 1895, I heard screaming in the elevator, then in its course down, and after the elevator boy opened the door I saw said Miss Behrens in a standing position in the corner of the elevator platform, screaming in a terrible way, with blood streaming from her mouth, half of her ear torn from her head, and her front teeth knocked in."

The door referred to in this statement by the words "the elevator boy opened the door," was the elevator door, which Grego, and Law, another of appellant's witnesses, testified was made of wood and glass, and not the shaft iron door which was kept open during the day time when the elevator was in operation, and which, had it been closed, Stagemann

could not have looked up. On this statement being presented to Stagemann, he testified, in substance, that it was true as far as it went, but not sufficiently full.

Grego testified on cross-examination, that before the accident occurred, he said to appellee, "Watch out, you are liable to get hurt." Appellee testified positively that no such thing occurred; also that neither of her shoes was injured, as in all probability would have been the case had it come in contact with the door with force enough to cause her to fall. Grego's theory of how the accident occurred is, as we think, wholly inconsistent with the injuries which appellee received. His theory is that she was injured by falling on the handle of the lever, by means of which the elevator was operated. Law, appellant's witness, testified that the elevator cage is about four by four and one-half feet. The lever moves in a quadrant or arc. Grego testified that the lever is situated on the south side of the elevator, and Andrew Neill, appellant's engineer, and witness, that it is situated on the north side. There is a notch in the center of the quadrant, into which the lever is moved when it is desired to stop the elevator. Underneath the lever there is a spring which must be pressed in order to get the lever out of the notch, so as to move it in either direction in the arc. The lever is about three and one-half or four feet high from the floor, and extends above the arc about one and one-half inch. Appellee was standing on the west side of the elevator in its descent. Appellee was taken to the Presbyterian hospital immediately after the accident. Dr. Morris, who attended her, testified that her lower jaw was broken, her upper lip cut, her right arm bruised below the shoulder, her knee injured, her left ear almost completely torn from her head, and a cut on the top of her head. In regard to her treatment, he says:

"I sewed on the ear, and, I believe, drilled one-half of her jaw when Prof. Senn came. Prof. Senn finished the operation of wiring the jaw; stimulated her and put her to bed. She had a cut at that time on the top of her head, but I did not discover it until the next day. I presume it did not cause any pain, and her attention was not drawn

to it. She remained in the hospital until the 1st of April. I turned her over to Dr. Miller. We put a plaster paris cast on her jaw to support it after we wired it; we put on surgical dressing to her ear, putting the knee in straight position. Dressed this abscess on the jaw after I came back, trying to get the dead bone out of the jaw. I had charge of her until the 1st of June; that is the last I saw of her professionally until about a month ago. * * * When this jaw was broken, there were probably five, six or seven teeth missing. I inserted this gag so as to break the adhesions at the hinge of the jaw every couple or three days. The ear healed at once, and the jaw, so far as the bone was concerned, made a very good union—splendid, at least to my idea—and at the time I left (the 1st of April), outside of the adhesions of the jaw and this abscess under the jaw, she seemed to have recovered from the immediate effects of the accident; she seemed to recover from the shock very well. When I examined her about a month ago, my attention was called to her jaw from the unsymmetrical appearance. One side of the jaw seemed to protrude more than the other—the angle of the jaw.”

Dr. Bergeron testified that he treated her five or six months after the injury; that she was suffering from general anaemia and insomnia; was exceedingly nervous, and had a poor appetite; that he examined her upper and lower jaws; that her teeth did not meet by about one-eighth inch, and she masticated on one side only, the effect of which would be a development of that side and a shrinking of the other.

Appellee states her injuries and the treatment of them as follows:

“The left limb was hurt at the knee. It was all black marked around it, and the limb there. I have no strength in it as I have in the right limb. I have no strength in the right arm whatever. Can not do anything which requires any strength. Have not been able to do anything in my avocation since the injury. My jaws were drilled through and wire put in it in the center. I could feel the wire all the time—it was right in there twisted around; and then my ear was sewed on. And then I had a cut in my head right here (indicating), and my hair covered it so that it didn't show. At the time of the injury I wore a felt turban—a small felt hat. After the accident

my hat was cut right where the cut was in my head. I had a black dress, a heavy coat with a cape, and the coat was all torn where this arm was hurt, the stitches were all torn, and the material was all torn. It was a heavy beaver. Pieces of my dress were torn right out where the knee was hurt—the left one. They put my head in plaster—a plaster cast—which they took off whenever they dressed the wounds, and it was so tight I could not open my mouth, and I had to lay perfectly quiet; I could not speak—I could not take any food, except what I could get through a small glass tube, for six weeks; and I had to lay straight on my back, for if I had moved the jaw would have come out of place. At the second week an abscess formed under my chin here, from the bone or splinters that had come out of here—formed an abscess, and that had to be lanced and they could not give me anything for that. They did not chloroform me, or anything. I had to have my senses through all. It came right through my mouth—the medicine they put through it; the hole went through to the mouth from this abscess. And at the end of the fifth week they took out this wire that he had fastened in there, and they had to pull it out with an instrument, and twist it and pull it out, and then at the sixth week they took this cast off; it had been on all this time; they took it off for good. Then they discovered that my mouth was so tightly closed that I could not get it open, and so they said it would have to be broken open; and so they inserted an instrument where my teeth are out in front here, and then they pushed it around and got it so that they could put that instrument in so that they could work it, and then they broke this open; it was just like breaking my whole head to pieces. The joints had to come loose. The first time they did it, it was like two hours, and I suffered terribly, and then when they had taken it out, the mouth closed just as tight as ever. After that it had to be put in every day; the jaws did not get better that one time, that's what I mean. I had to exercise it, open it all day long, try to open it, and open so slowly that I could hardly notice it. The doctor came in the morning for two weeks with that same instrument, and did the same thing over again. Dr. Miller did it after Dr. Senn did it the first time. At the end of every day it seemed I got it open a little wider, and still it didn't act natural like it should. So I left the hospital at the end of nine weeks, and then the doctor didn't put it in any more—the instrument. The week before I left the hospital they

lanced this again. There was some more dead bone in here, and I did not have any ether or anything. They lanced that and took out a little bone, and there was still some left. I left the hospital at the end of nine weeks. Went three times a week to have this abscess dressed, as it was always discharging. I used to see Dr. Senn quite often. I kept on coming and having them put a probe in there, for the opening was still open. They put medicine in here, peroxide, through a glass syringe, which was very painful, and then they would seal it up with a little dressing. Kept on coming until October, and then Dr. Senn was back again. The 2d of October I was operated on again. They took out all the dead bone. When I 'came to' from the ether, this was all sewed up and was all bandaged up. I had to lay quietly and in a few days they took out the stitches and dressed it, and then my jaws were stiff again. But I exercised them myself, so that I didn't have to have the instrument put in again. I went home; and then I came every other day to have it dressed, and on the 30th of October, 1895, it was all healed. Afterward I went to Dr. Bergeron. Ever since then my mouth has been like I have not been able to chew on the left side at all, for part of my jaw is gone—all the bone—and the teeth do not meet, so that I have to chew on the right side. I had very nice teeth—they are all spoiled now, for of those that are left, half are dead. The other half are useless, and I have not been able to feel like I did before."

Grego's theory is that the cut through the hat and on top of the head, the broken jaw, the knocked-out teeth, and torn-off ear, the bruised arm and knee, the torn coat and dress, all resulted from the appellee falling on the lever which extended from the arc only about one and one-half inch, and which, as he says, he had in his left hand. It is not surprising that the court and jury were somewhat impatient while listening to the announcement of this theory and that this occurred in Grego's examination: Q. "Do you know how this lady hit the top of her head, so it cut a hole through her hat?" A. "I could not tell you." Q. "Did she do that by falling on the lever?" A. "That is the only way she could do it." The jury was fully warranted in discrediting Grego's theory and in finding that the accident occurred by reason of his carelessness and negli-

gence in operating the elevator, and that appellee was injured in the manner stated in the second count of the declaration. The fact that the elevator shot upward after it had reached the main floor, and while appellee was attempting to alight from it, is of itself evidence of want of care and mismanagement in its operation. *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222.

The appellant introduced evidence to show that the machinery of the elevator was in good condition, and that Grego was competent to operate the elevator; but, in the view we take of the case, we do not consider it necessary to refer to this evidence.

The court, at the close of all the evidence, properly overruled appellant's motion to instruct the jury to find the appellant not guilty.

Appellant's counsel urge that the court erred in giving appellee's second and third instructions, and in refusing to give the following instructions at appellant's request:

"The court instructs the jury that if they believe from the evidence that this car descended in the usual way and that this accident was not occasioned by the manner in which this elevator was conducted and operated, they should find the defendant not guilty."

"The court instructs the jury, as a matter of law, that if, after a careful consideration of all the evidence in this case, they are unable from the evidence to determine whether the plaintiff was injured in the way and by the means detailed by her in her examination, or whether she received her injuries in the way detailed by the witness Grego, then the jury must find the defendant not guilty."

We find no error in either of the second or third instructions for appellee. The first of the above instructions is wholly inapplicable to the facts of the case, and was properly refused. As to the second, the appellee did not undertake to "detail" the precise manner in which she was injured; she merely testified that she was injured by the elevator flying up, but what she came in contact with or was crushed against, she said she did not know. We think the instruction was properly refused.

The court gave twenty-six instructions for appellant, fully instructing the jury on every possible phase of the case.

Lastly, it is urged that the damages are excessive. It does not appear from the record that any improper influence was exerted upon the jury by the remarks of counsel or otherwise, or that the trial was in any respect unfair.

The appellant introduced no evidence contradictory of appellee's evidence of her injuries, and in view of the evidence in regard to her injuries, we can not say, from the mere amount of the verdict, that the jury was swayed by passion, prejudice, or undue partiality for appellee. Under these circumstances, we are not aware of any sound principle which would warrant us in holding that the damages are excessive.

The judgment will be affirmed.

Watson Cut Stone Co. v. William Small.

1. INSTRUCTIONS—*Parties—When Estopped by Asking.*—A party is estopped from complaining of an error in his adversary's instruction, where he has asked the court to commit the same error in his own instructions.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed March 16, 1899.

Appellee, an experienced stone cutter, was injured January 26, 1896, by the falling upon him of part of a defective or broken corbel stone which extended under the projection of a series of bay windows, commencing at the top of the first story of a six story building at Ellis avenue and Thirty-fifth street, Chicago, while he was engaged in the employ of appellant in cutting out a piece from the stone to put in another piece and thus repair it.

The building was a new one, completed in the fall of

80	328
82	564
80	328
181s	366
80	328
91	483
80	328
190s	360

Watson Cut Stone Co. v. Small

1895, and appellant had the contract for furnishing and setting the cut stone work, including this corbel stone. It employed as sub-contractors the firm of Howarth & McBeth to set the cut stone, and this firm actually did the work of setting this corbel stone, under the superintendence of appellant. Appellee had nothing to do with the original construction of the building, but was called in by appellant, in January, 1896, to repair this corbel stone, it having begun at that time to crack in one or more places, and one piece of it had fallen out before he begun the work of repair.

Appellee's original declaration consists of five counts, the first, third and fifth of which were dismissed by appellee, and the second and fourth are based upon negligence of appellant in not properly supporting and fastening the corbel stone. Three additional counts were filed November 7, 1897, all which alleged negligence in original construction or material used therein.

Three other additional counts were filed December 7, 1897, the first of which is based upon the failure of appellant, knowing the danger to which appellee was exposed at his work, to notify him of such danger, and alleging that appellee did not know of the danger. The second and third of these additional counts charge, in different ways, negligence in the original construction of the building.

Appellant pleaded the general issue.

A trial was had November 16, 1897, during the course of which appellee dismissed the first, third and fifth counts of the original declaration, which resulted in a verdict on the remaining counts of that declaration and the counts of November 7, 1897, in favor of appellee, of \$1,000, which was set aside by the court and a new trial awarded.

A second trial was had on these counts and the additional counts filed December 7, 1897, which resulted in a verdict and judgment for appellee of \$1,500, from which this appeal is taken.

At the close of plaintiff's evidence, defendant asked an instruction to find it not guilty, which was refused. Defendant then asked seven separate instructions, directing

the jury to find it not guilty as to each of the several counts then before the jury, except the third count of December 7, 1897, each of which was refused. Each of these same instructions was asked at the close of all the evidence and refused by the court in the same order as at the close of plaintiff's evidence.

Among other instructions, not in question, at the instance of appellee, the court gave the following, viz.:

"18. The court instructs the jury that the law is, that where a contractor sublets a part of the work which he is to perform to another, and the sub-contractor in the execution of the work so let to him is superintended and controlled by the contractor, and the work is performed negligently by the sub-contractor, then the negligence of the sub-contractor is also the negligence of the original contractor, providing the part of the work performed negligently is performed under the supervision and direction of the original contractor;"

but refused to give, as requested by appellant, the following, viz.:

"32. If you believe from the evidence that the accident in question happened through the negligence of independent contractors who sublet from the defendant, the Watson Cut Stone Company, the setting of the stones in question, and that the said contractors were reasonably competent and skillful for the performance of said work, then your verdict will be not guilty."

AMERICUS B. MELVILLE and F. J. CANTY, attorneys for appellant.

WILLIAM C. SNOW, attorney for appellee; DARROW, THOMAS & THOMPSON and D. J. DOWNEY, of counsel.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Appellant contends that appellee assumed the risk of the danger to which he was exposed, and if he did not, he was guilty of contributory negligence; that the court erred in refusing the several instructions noted in the statement, and

in giving appellee's eighteenth instruction. We are inclined to the view that the evidence is not sufficient to sustain the judgment under either of the several counts on which the case was submitted to the jury, except the first additional count filed December 7, 1897, which is based upon the failure of appellant to notify appellee of the danger to which he was exposed while engaged in his work for appellant; but however that may be, we are of opinion this can not now be urged as a cause for reversal, because appellant asked the thirty-second instruction upon the theory it was not liable for any negligence charged, and the court gave, at its instance, several instructions, in which is submitted to the jury the question of any and all negligence charged against it. *Jeffrey v. Robbins*, 73 Ill. App. 362; *Egbers v. Egbers*, 177 Ill. 89.

This fact, we think, also eliminates from the case any question of independent contractor which is made by appellant; but even if this were not so, the clear preponderance of the evidence is against appellant on this point. A verdict for appellant, based on the theory of independent contractor, could not be sustained by the evidence.

The evidence shows that appellee is an experienced stone cutter and familiar with the manner of construction of such buildings as this one. He testified in part, viz.:

"I went to the building, and the scaffold had been partly erected. Mr. Beck and I finished the balance of the scaffolding at 35th street and Ellis avenue; then he showed me what he wanted me to do, and I looked up at the hole in the stone and asked him what was the cause of that breaking away. The break was in the corbel on 35th street. I asked him if there was any weight on the nose of the corbel stone, and he said there was not. He said he had the mortar all sawed out. I said, what made that piece fall away there. And he said the stonecutter in drilling that anchor hole in there, the piece broke away and came down. So he said the stonecutter strained the stone when he was drilling for the anchor. The anchor is a piece of iron about an inch in diameter. It came down from the floor above. I don't know what it was fastened to, but it came down and was let into the corbel stone about three or four inches

to sustain the weight of the corbel from falling out in the street.

Q. And was it fastened below—screwed in? A. No, it was leaded. Boiling lead was run around the iron. I asked him then, the second time, about the mortar. I asked him if there was any mortar in that stone around the top of the corbel stone, and he said no, he had it all sawed out, and there was nothing in there at all. There is no weight on that, he said. The wall is faced with stone, and behind is brick work that is carried up.

THE COURT: The wall is really brick, and faced with stone? A. Yes. The brick work is about eighteen inches thick. The first story is called the basement. It is about fifteen feet to the top of the corbel stone. The corbel is above the first story."

It is shown from this and other evidence, that appellee was familiar with the ordinary methods of construction of such buildings, and that he suspected that the cause of the break in the corbel stone was because the mortar, which should have been placed between the corbel and ashler stone above at the time of the construction of the building, had not been removed, as should have been done in a proper construction.

Appellee also says that the seam or joint between the corbel stone and ashler above it, was about eighteen inches above him; that he could not see it from where he was working below, and the evidence shows that while he was so working, the corbel stone gave way, broke down the scaffolding on which appellee was at work, and injured him.

Whether or not this mortar had been sawed out from between the corbel stone and ashler, as represented by Beck to appellee, was a question in dispute, on which there was a conflict in the evidence. There was also a question, on which there was a conflict in the evidence, as to whether the failure to saw out the mortar, if such was the fact, was a sufficient cause to account for the giving way of the corbel stone, and also whether that was what caused it to give way and fall.

From a careful consideration of the evidence in these respects (which it seems unnecessary to set out in detail),

Porter v. Horton.

we think it justified the jury in finding, as it must have done, that the mortar was not sufficiently sawed out to prevent a pressure of the ashler stone from above on the corbel, and that that fact was a sufficient cause for, and did cause, the giving way of the corbel stone, and the consequent injury to appellee.

The questions of assumed risk and contributory negligence so thoroughly and fully presented by appellant's counsel, were, in our opinion, under the facts of this case, purely questions of fact for the jury, and not of law for the court. We do not, therefore, review the numerous cases cited, believing, as we do, that there was no error in submitting the case to the jury, at least upon the first of the amended counts of December 7, 1897. *Offutt v. World's Col. Exp'n*, 175 Ill. 472, and cases there cited.

Appellee had the right to rely, on what Beck told him in regard to the mortar being sawed out, and it was not negligence, as matter of law, for him to continue his work after this statement from Beck, when appellee was not in a position to see the danger.

Objection is also made to the admission of certain evidence relating to the manner of construction of the building and its effect upon the corbel stone in question, but we do not think it of importance, and there was no reversible error in the court's rulings in this regard.

The judgment is affirmed.

Ella M. Porter, Adm'r, v. Anna R. Horton.

1. **CONTRIBUTION—Co-sureties, at Common Law.**—A co-surety, who has been obliged to satisfy the joint liability of the several sureties, may recover at common law, and under the common counts, the amount due by way of contribution from each co-surety.

2. **BILL OF PARTICULARS—Its Purpose.**—The bill of particulars operates in practice merely to give a proper notification to the adverse party

of the nature and grounds of the claim to be presented, and must not be made the instrument of the injustice which it is intended to prevent.

8. *SAME—Limits the Right of Recovery.*—A bill of particulars limits the right of recovery to the grounds therein specified.

Assumpsit, on a contract of indemnity. Trial in the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this Court at the October term, 1898. Reversed and remanded. Opinion filed March 16, 1899.

Copy of agreement referred to in the opinion of the Court:

“CHICAGO, Ills., Jan. 26, 1888.

Geo. M. Porter, Esq., City.

“DEAR SIR: If you prove to be accepted as bondsman for F. L. Horton and will go on his bond for the sum of fifteen hundred, I will also go on the same bond jointly with you. I will hereby agree to hold you harmless in any event on said bond; I am the owner of the property, house, lot and furniture, at 3248 Graves Place, Chicago, worth, clear of incumbrance, the sum of \$5,000. I will in addition, pay you, as soon as Mr. Horton receives the loan on his contract, for which this bond is to cover, all my indebtedness to you for groceries to date, and thereafter pay each week for all groceries got thereafter, besides which Mr. Horton will pay at once twenty-five dollars for the accommodation of using your credit on said bond.”

(Signed) MRS. ANNA R. HORTON.”

On April 7, 1888, Frederick L. Horton executed a bond for \$1,500 to D. Appleton & Co., and Anna R. Horton, his wife (appellee), and George M. Porter (intestate of appellant), executed the bond as sureties. Appleton & Co. recovered \$942.58 in a suit on the bond against the principal, Frederick L. Horton, and George M. Porter, one of the sureties. George M. Porter, the surety, paid the judgment. This suit was brought by his administratrix to recover of Anna R. Horton, the other surety, on account of such payment. Anna R. Horton, appellee, wrote to George M. Porter on January 26, 1888, to the effect that if he, Porter,

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would sign her husband's bond she would indemnify him for any loss thereby sustained.

In the suit here, appellant, as administratrix of the estate of George M. Porter, deceased, sought to recover, upon this agreement to indemnify, the whole amount for which her intestate was held liable as a surety on the bond, and filed a special count in her declaration counting upon such agreement. She also filed the common counts. A copy of the written agreement to indemnify was filed with the declaration.

Before trial appellee obtained a rule upon appellant to file a bill of particulars. In compliance with the rule the following was filed as a bill of particulars; it is not shown by the abstract, but appears in the supplemental record :

"September 25, 1891, to payment by Geo. M. Porter in his lifetime to D. Appleton & Co. of the judgment obtained against Frederick L. Horton and Geo. M. Porter, in case in the Circuit Court, having general number 71,162, obtained July 18, 1891, for \$942.58 and \$21.85 costs, with interest at six per cent from the date of judgment until September 25, 1891, under the circumstances alleged in said declaration, and interest upon such amount, which amounts to the sum of \$973.20 and interest upon such amount at five per cent."

At the trial the issue of facts was contested as to whether the letter, by which appellee agreed to indemnify Porter, was written in relation to this bond or another bond which Porter had executed for the same parties to a different obligee. The jury determined that the letter was written, and the agreement to indemnify thereby made was given in relation to the other and not to this bond. Counsel for appellant concedes that this finding by the jury was warranted by the evidence and is determinative of the right to recover upon the special agreement to indemnify. But counsel for appellant asked for instructions to the jury, not only upon the theory of a right to recover under the special count upon the agreement to indemnify, but as well upon the theory of a right to recover one-half of the amount paid by appellant's intestate in satisfaction of the bond, under the common counts, and upon a theory of right of contribu-

tion only. The instructions bearing upon a right to recover under the special count were given. Those relating only to a right to recover under the common counts were refused. Frederick L. Horton was permitted to testify, over the objection of appellant, to transactions had by himself with Porter in his lifetime in relation to the execution of the bond. The jury found the issues for appellee, the defendant below, and from a judgment upon that verdict this appeal is prosecuted.

CONSIDER H. WILLETT, attorney for appellant.

One of two sureties paying the debt of their principal can recover one-half of such payment from his co-surety on the ground of equality of burden and benefit. 24 Am. & Eng. Ency. 809; Klein v. Mather, 7 Ill. 317; Golsen v. Brand, 75 Ill. 148; Van Petten v. Richardson, 68 Mo. 379; Jeffries v. Ferguson, 87 Mo. 244; Van Winkle v. Johnson, 11 Or. 469; Wells v. Miller, 66 N. Y. 258; Young v. Shunk, 30 Minn. 505; Urbahn v. Martin, 46 S. W. R. (Tex.) 291; Deering v. Winchelsea, 2 Bos. & P. 270; Martin v. Frantz, 127 Pa. St. 389; Dupuy v. Johnson, 1 Bibb (Ky.), 562.

Frederick L. Horton, as the agent of the defendant, his wife, testified to acts and conversation of George M. Porter, now deceased, and upon such evidence the jury found the letter of January 26, 1888, did not relate to the Appelton & Co. bond. Langley v. Dodsworth, 81 Ill. 86; Henry v. Tiffany, 5 Ill. App. 548; Berdan v. Allen, 10 Ill. App. 91; Wagenseller v. Prettyman, 12 Ill. App. 341; Hulburt v. Meeker, 104 Ill. 540; Trunkey v. Hedstrom, 131 Ill. 204.

BULKLEY, GRAY & MORE, attorneys for appellee.

The object of requiring the plaintiff to file a bill of particulars is to inform the defendant of the claim he is called upon to defend against, and its effect is to limit and restrict the plaintiff on the trial to proof of the particular acts or causes of action therein mentioned. Waidner v. Pauley, 141 Ill. 442; Morton v. McClure, 22 Ill. 257; McDonald v. The People, 126 Ill. 150; Humphrey v. Phillips, 57 Ill. 132; Star Brewery Co. v. Farnsworth, 172 Ill. 247.

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MR. JUSTICE SEARS delivered the opinion of the court.

But two questions are presented for consideration, viz.: the propriety of the ruling by the trial court refusing the instructions which related to a right of recovery under the common counts, and the admission of the testimony of Frederick L. Horton as to transactions with George M. Porter, appellant's intestate, in his lifetime, in relation to the subject-matter of the suit.

We think it clear that a co-surety, who has been obliged to satisfy the joint liability of the several sureties, may recover at common law and under the common counts the amount due by way of contribution from a co-surety. *Sloo v. Pool*, 15 Ill. 47; *Golsen v. Brand*, 75 Ill. 148; *Harvey v. Drew*, 82 Ill. 606; *Odlin v. Greenleaf*, 3 N. H. 270; *Godall v. Wentworth*, 20 Me. 322; *Cowell v. Edwards*, 2 Bos. & P. 267.

The only question, then, is as to whether the bill of particulars filed by appellant so limits her right of action by its specifications as to preclude her right to recover under the common counts upon the right to contribution from appellee.

We are of opinion that to so hold would be to give to the bill of particulars an unreasonably narrow and technical construction. The bill of particulars operates in practice merely to give a proper notification to the adverse party of the nature and grounds of the claims to be presented. It has served that purpose, if from it the litigants are apprised of that which they will have to meet. To give it any more technical effect would be to thwart the ends of justice.

In *Millwood v. Walter*, 2 Taunton, Chief Justice Mansfield said: "The bill of particulars must not be made the instrument of that injustice which it is intended to prevent."

It is well settled in this State, that a bill of particulars operates to limit the right of recovery to the grounds therein specified. *Waidner v. Pauly*, 141 Ill. 442; *Star Brewery v. Farnsworth*, 172 Ill. 247.

But we hold that here the recitals of the bill of particulars are broad enough to inform the appellee that appellant

sought to recover upon all her rights arising from the executing of the bond and the payment by her intestate of the sureties' liability thereunder.

There would seem from the record to be an undoubted right of appellant to a contribution by appellee. To deny that right upon the ground that this bill of particulars was insufficient to apprise appellee of the grounds of appellant's right to a recovery, would be, as we view it, a straining of technical rules to accomplish an injustice.

The remaining question is as to the ruling of the trial court in admitting the testimony of Frederick L. Horton as to transactions had with appellant's intestate in relation to the executing of the bond here in question.

We are inclined to view the evidence given by Horton as competent and properly admitted. But the admission of it is a matter of no importance, for there was no conflict in the evidence as to the fact that the agreement to indemnify was given in connection with the Upton bond, and not in relation to the bond here. If all the evidence of Horton were stricken out, it would in no way affect the conclusion which the jury must have reached from the undisputed evidence in the case in relation to the agreement to indemnify.

Because of the refusal of the trial court to instruct the jury as to appellant's right to recover under the common counts by way of contribution, the judgment is reversed and the cause remanded.

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**Robert H. McElwee et al. v. Jane Wilce, Executrix,
Edward Harvey Wilce and George C. Wilce,
Executors of the last will and testa-
ment of Thomas Wilce, deceased,
for the use of Robert Hill.**

1. **GARNISHMENT—*Service of Writ Creates no Lien.*** Service of the garnishee writ does not create a lien in favor of the creditor, upon the moneys in the hands of the garnishee. It creates a personal liability to respond to any judgment that may be recovered against him, but nothing more.

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2. **SAME—Payment by Garnishee, When at his Peril.**—A person served with process of garnishment may pay his debt notwithstanding the garnishment, but if he does so without taking an indemnifying bond, it will be at his peril, and he may be compelled to pay the debt twice.

3. **JUDGMENT—Effect of Reversal After Collection.**—Where a judgment, after its collection, is reversed by the Appellate Court, the plaintiff in it will be liable to repay the amount collected to the party from whom it was collected.

4. **APPELLATE COURT PRACTICE—Remanding Causes.**—Where nothing can be gained by remanding a cause the judgment will be reversed without a remanding order.

Attachment, and garnishee proceedings. Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Finding and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Reversed but not remanded. Opinion filed March 14, 1899.

The Otter Creek Lumber Company was indebted to the appellants, McElwee & Company, who began an attachment suit upon the indebtedness and garnisheed Thomas Wilce. In that suit, Wilce, as garnishee, answered, and admitted he owed the Otter Creek Company \$876.22, at the time of the service of the garnishee writ upon him.

Subsequently there was a trial of the attachment suit, and a verdict and judgment was had in favor of McElwee & Company against the Otter Creek Company and against Wilce on his answer as garnishee for the amount admitted by him to be owing by him.

An execution issued against Wilce, and he paid to the sheriff \$880.60, in full satisfaction of the execution, and on the same day, the same was paid over to McElwee & Company by the sheriff.

Before that time, however, and before the judgment was rendered, but after Wilce was served as garnishee, he paid to the Otter Creek Company the amount he was indebted to it at the time of the service of the writ, viz., \$876.22.

The same day that Wilce paid said \$876.22 to the Otter Creek Company, and as a part of the transaction, the appellee Hill uniting with the Otter Creek Company, and one Wright, who was its president, gave his bond to Wilce, in

due form, obligating himself to hold Wilce harmless and protect him against any judgment that might be rendered against him, as garnishee, or in any other capacity in said suit.

And after Wilce had satisfied the execution as above mentioned Hill repaid to Wilce the \$880.60 that Wilce had paid to satisfy the execution. At the time Hill so paid Wilce, he and Wilce entered into a writing, as follows:

“Whereas, heretofore, in the year 1887, Thomas Wilce paid to the Otter Creek Lumber Company the amount of his indebtedness to said company, after service had been made upon him as garnishee in the suit of Robert H. McElwee et al. v. the Otter Creek Lumber Company, Superior Court of Cook County, Illinois; and

Whereas, such payment was made by reason of said Wilce receiving from Robert Hill an indemnity bond protecting him against any liability to the plaintiffs in said suit by reason of said payment; and,

Whereas, judgment was recovered by plaintiff in said suit against said company, and also against said Wilce as garnishee, and said Wilce has been compelled to pay to them the amount he had already paid said company, and said Hill is desirous of paying said Wilce, under his indemnity bond, said amount of money under such an arrangement that it shall be paid back to him by said Wilce in case the Otter Creek Lumber Company is reversed under the writ of error which it is about to sue out, and said Wilce discharged as said garnishee;

Now, therefore, it is agreed between said Robert Hill and Thomas Wilce as follows: Said Hill pays to said Wilce, at the time this instrument is executed, the sum of eight hundred and eighty-nine dollars and thirty cents (\$889.30), in consideration of which said Wilce agrees to repay to said Hill on demand, after the said Wilce shall be discharged as such garnishee in said suit, on final judgment, any and all sums of money which may hereafter be repaid to said Wilce, for or on account of any payments the said Wilce may heretofore have made in said suit.

The said Wilce further agrees, at any time on demand of said Hill, to commence proceedings to recover said sum paid by said Wilce to the plaintiffs in said suit, the said Hill employing attorneys and paying all expenses attending such litigation.

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Witness our hands and seals this 27th day of September, A. D. 1890.

ROBERT HILL. [SEAL.]
THOS. WILCE. [SEAL.]”

After the above agreement was made, this court, in a writ of error suit that had been prosecuted to reverse the judgment in favor of McElwee & Company, reversed that judgment and remanded the cause, upon the ground, as appears from the opinion, that the suit was prematurely brought. 37 Ill. App. 285.

It seems that the claim of McElwee & Company against the Otter Creek Company, was for a considerably larger sum than was made out of Wilce, as garnishee, and that pending the matters we have mentioned, Wright, the president of the Otter Creek Company, became an inmate of the Michigan State penitentiary, for life. After the cause was redocketed in the court below, it appears from the testimony of Mr. Carney, a member of the firm of McElwee & Company, defendants, that one Johnson came to McElwee & Company and offered to pay them a certain sum, which, in addition to what they had received, should wipe out the transaction, and his offer was accepted and the suit was dismissed.

It does not clearly appear in what capacity Johnson was acting at the time, although it does appear that in previous transactions between McElwee & Company and the Otter Creek Company, Johnson had acted as a representative of the latter, and that he settled most of the business of the latter company after its president got into trouble and went to the penitentiary.

It was admitted at the trial, that neither Wilce nor Hill were parties to such settlement, did not know of it until after it took place, and never ratified or adopted it.

In pursuance of the written agreement between Wilce and Hill, this suit was brought in the name of Wilce (who having died, his executors have been substituted for him) for the use of Hill, to recover back from McElwee & Company the money they collected from Wilce under the execution against him.

The case was tried by the court, without a jury, and the judgment in favor of appellees for \$979.67, is before us upon appeal.

SCHUYLER & KREMER, attorneys for appellants.

ERIO WINTERS, attorney for appellees.

The service of a garnishee process, in a proceeding commenced by attachment, does not create a lien in favor of the creditor, upon the property or effects of the debtor in the hands of the garnishee. The statute does not prohibit the garnishee from delivering the property to the debtor, but only renders him liable, upon failure to produce it, to satisfy the judgment. *Bigelow v. Andress*, 31 Ill. 322; *Gregg v. Savage*, 51 Ill. App. 281.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The service of the garnishee writ upon Wilce did not create a lien in favor of McElwee & Company, the creditor, upon the moneys in Wilce's hands. By it there was created a personal liability of Wilce to respond to any judgment that might be recovered against him, but nothing more. *Bigelow v. Andress*, 31 Ill. 322; *Gregg v. Savage*, 51 Ill. App. 281.

Wilce might, if he chose, as he did, pay the Otter Creek Company, in spite of the garnishment, but doing so was at his personal risk.

Having paid the Otter Creek Company, and having been required by law to pay, also, the attaching creditors of that company, Wilce had in effect paid his debt to the Otter Creek Company twice, and if the judgment of the attaching creditor of the Otter Creek Company had stood, he would have been remediless, if no bond had been given to him, except as against the Otter Creek Company for such double payment.

The judgment in the suit under which he had been compelled by law to pay the attaching creditor, having, however, been reversed, Wilce would have been entitled either

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in his own name or in the name of the Otter Creek Company, for his use, to recover back the payment thus illegally enforced from him, or he might recover, compulsorily or amicably, from the Otter Creek Company his overpayment to it, and leave that company to pursue whatever remedy it might have against the attaching creditor for having made upon execution an invalid judgment against it.

This latter was what Wilce in effect did. The Otter Creek Company had given him a bond, with Hill, as surety, to pay back to him whatever he might have to pay to the attaching creditor, and when he was compelled, by execution, to pay the attaching creditor, the Otter Creek Company, by Hill, paid him all that he had suffered by reason of such compulsory payment. He had no longer, either legally or equitably, any ground for complaint against anybody. He had then simply paid and paid but once what he owed to the Otter Creek Company.

If Hill has suffered because he gave a bond for the Otter Creek Company, his remedy is not at law through Wilce against the attaching creditors, who may have received money, which in equity and justice belongs to the Otter Creek Company. Hill can not recover through Wilce what Wilce could not recover.

It may or may not be that Hill can recover through the Otter Creek Company against the attaching creditors, McElwee & Company, what they have which may belong to the Otter Creek Company, but that question is not in this record.

Appellee in his brief says, and we agree with him, that "this suit must stand or fall on Wilce's right to recover." And in our view Wilce has no shadow of right to recover.

The question of the competency of Carney, one of the appellants (defendants) as a witness, is immaterial under this aspect of the case, and although he was probably not competent, it need not be decided.

Nothing can be gained by remanding the cause and the judgment will, therefore, be reversed without a remanding order.

William S. Barbee v. Henry Eschmeyer.

Appeal from the Superior Court of Cook County.

A question of fact was held to be properly decided by the jury, and the judgment therefore affirmed.

Opinion filed March 16, 1899.

MITCHELL & ADDINGTON, attorneys for appellant.

W. B. MOAK, attorney for appellee.

John Knorst, Jr., v. Jennie Helen Knorst.

Error to the Superior Court of Cook County.

The decree of the chancellor was held not to be sustained by the evidence in the record, and is reversed with directions to dismiss the bill for want of equity.

Opinion filed March 16, 1899.

D. M. KIRTON and CLAUDIUS PETERS, attorneys for plaintiff in error.

M. J. RIESE and E. U. FLIEHMAN, attorneys for appellee.

Marcus Clark v. Emilie Hoffman.

Appeal from the Superior Court of Cook County.

Questions of fact only were involved in this cause. The decree is affirmed.

Opinion filed March 16, 1899.

BLUM & BLUM, attorneys for appellant.

B. M. SHAFFNER, attorney for appellee.

City of Chicago v. Anna Hogan.

1. APPELLATE COURT PRACTICE—*Objections which Come too Late.*—Where a suit is begun and prosecuted to judgment by a minor, without the intervention of a next friend, an objection for this cause, made for the first time in the Appellate Court, and after such minor had attained her majority, comes too late.

City of Chicago v. Hogan.

3. **SAME—Objections to Evidence to be Made in the Trial Court or Considered as Waived.**—Objections to evidence on the ground of its being incompetent can not be raised for the first time upon appeal. If not made in the trial court the objection will be treated as having been waived.

3. **PRACTICE—Failure to Ask Instructions.**—Where the trial judge, in ruling upon the competency of evidence, stated that he would so instruct the jury, the party affected by such ruling can not complain that this was not done, unless he shows by the record that the court was called upon thus to instruct the jury and refused to do so.

4. **NEW TRIALS—For Newly Discovered Evidence—Diligence Must be Shown.**—A new trial will not be allowed because of newly discovered evidence, where requisite diligence to discover such evidence has not been shown, even though such evidence might materially lessen the amount of damages upon another trial.

Trespass on the Case, for personal injuries. Rehearing on remanding order from the Supreme Court. Formerly reported in 59 Ill. App. 446. Affirmed. Opinion filed March 14, 1899.

MILES J. DEVINE, attorney for appellant; J. B. O'CONNELL, of counsel.

RUSSELL M. WING and LOREN C. COLLINS, attorneys for appellee.

The neglect or omission to argue a question properly assigned as error upon the record has uniformly been treated and held as an abandonment of that question. *City of Mt. Carmel v. Howell*, 137 Ill. 91, 93; *Chicago City Ry. Co. v. Van Vlick*, 40 Ill. App. 367; *Armstrong v. Barrett*, 46 Ill. App. 193; *Fidelity & Casualty Co. v. Waterman*, 161 Ill. 637.

It is the general doctrine that new trials will not be granted to enable a party to introduce evidence merely cumulative in character. *Petefish, Skiles & Co. v. Watkins*, 124 Ill. 390, citing *Schlencker v. Risley*, 3 Scam. 483; *Crozier v. Cooper*, 14 Ill. 139; *Skelly v. Boland*, 78 Ill. 438; *Laird v. Warren*, 92 Ill. 204; *McCollom et al. v. Indpls. & St. Louis R. R. Co.*, 94 Ill. 534; *Knickerbocker Ins. Co. v. Gould et al.*, 80 Ill. 395; *Abrahams v. Weiller*, 87 Ill. 179; *Jacobson v. Gunzburg*, 150 Ill. 137.

The objection that the suit was improperly brought by a

minor in not suing by a next friend or guardian, can not be taken advantage of for the first time in the Appellate Court. The objection should have been raised in the court below before the trial. *Helmuth et al. v. Bell et al.*, 49 Ill. App. 626; 150 Ill. 268.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This case was here once before (59 Ill. App. 446), and from the judgment of reversal, without remanding, then entered, because, as we thought, the city was under no duty in the premises, it was taken to the Supreme Court (168 Ill. 551), and by that court was remanded to this court, for further consideration.

The facts are made to appear in the statement of the case preceding the opinion of the Supreme Court, and need not be repeated. The verdict in the Circuit Court was for \$20,000, and, a remittitur being entered, the judgment for \$15,000 appealed from was rendered.

It is urged, without citation of authority, that because the suit was begun when appellee was a minor, in her own name and without the intervention of a next friend, the judgment must be reversed.

The accident happened and the suit was begun when the appellee was sixteen years old, in the year 1891. The judgment was recovered in December, 1894, when she was nineteen and a half years of age.

Had the point been made in the trial court during her minority, it would have been well taken, although then it could probably have been cured by amendment. But not being made until after judgment, when she was of lawful age, and being made for the first time in this court, it comes too late. *McClay v. Norris*, 4 Gil. 370; *Helmuth v. Bell*, 49 Ill. App. 626.

The refusal of the court to set aside the verdict and grant a new trial upon the ground of newly discovered evidence, based upon affidavits filed on behalf of the city, is claimed to constitute error for which the judgment should be reversed.

The tendency of the affidavits setting up the newly discovered evidence is to show that appellee was not so seriously injured by the accident as she claims to have been. They recount her appearance and conduct in public places in apparently good health, both of mind and body, subsequent to the alleged injury and down to a period shortly before the trial.

From the number of affidavits filed and the circumstances detailed it is plain that the apparent physical and mental condition of the appellee, so set forth, must have been generally known in the neighborhood where she lived. A reasonable amount of inquiry in such neighborhood would almost certainly have apprised the officers and agents of the appellants of everything set forth in the affidavits weeks and months before the trial took place.

It appears by the bill of exceptions that there was a previous partial trial of the case, during which the appellee fell in a fit in the court room, and it is stated in appellee's brief, and stands uncontradicted, that when the last trial came on it was agreed by counsel for the respective parties, in the presence and with the approval of the trial judge, that she should not be present at the trial. From such circumstances it is manifest that appellant was informed in abundant season of the character of the injuries which should be attempted to be proved, at least in respect of such injuries as the affidavits filed have a tendency to rebut.

The only showing made in behalf of appellant to overcome this presumption of a lack of diligence on its part in securing at the trial the testimony of the several affiants, is contained in an affidavit by the assistant city attorney, who deposed that he had sole charge of the preparation of the case for trial, and tried the case both times, and "worked diligently to find out all the facts that could or might have any bearing upon the issues," and "that he did not know of the facts or matters set up in and by the affidavits filed in this cause upon the application for, and in support of the motion for a new trial of this case, before or at the time of said trial before Judge Dunne and a jury, but states the fact

to be that all the facts and matters contained in all the affidavits filed in said cause in support of the motion for a new trial herein came to his knowledge a long time after the trial was concluded and a verdict rendered in said cause."

These statements are of conclusions only. There is nothing to show what diligence was used, or that reasonable diligence beforehand would not have disclosed everything that the affiants, who were neighbors and acquaintances of the appellee, depose unto. A new trial will not be allowed because of newly discovered evidence, where requisite diligence to discover such evidence before the trial has not been shown, even though such evidence might materially lessen the amount of damages upon another trial. *Union Rolling Mill Co. v. Gillen*, 100 Ill. 52; *Crozier v. Cooper*, 14 Ill. 139.

There was no error in refusing a new trial because of newly discovered evidence.

Another point made by appellant is that it was error to admit in evidence portions of a certain bond given to the city by James Kincade, the contractor who built the viaduct. Kincade and certain of his employes had testified for the city with reference to the putting up and maintaining of barricades at the end of the elevated sidewalk, to warn passers-by of the dangers of the situation, and turn them away from the hazard beyond. The parts of the bond that were permitted, over objection, to be read to the jury, provided that Kincade should erect and maintain strong and substantial barriers to effectually prevent accidents, etc., and would indemnify the city against liability by reason of default by Kincade in such respects. And the announced object of reading the same in evidence, and the sole ground of admitting the same, as held by the court, was to show the interest of the witness Kincade in the litigation, for the purpose of affecting his credibility as a witness.

We have examined the record with all the care the importance of the point suggests to us, and our conclusion is that if error there was in respect of it, there has been no adequate preservation of it in the record.

Such parts of the bond as were admitted in evidence

were offered upon cross-examination by appellee of Kincaide, when he was being questioned concerning his interest in the litigation.

In the discussion that ensued between counsel and the court, the only objections by appellant were as follows, and, in point of time, in the following order :

“ Objected to by counsel for defendant as it (the bond) is a part of the plaintiff’s case in chief, and not a part of the cross-examination.”

“ Objected to by counsel for defendant;”

“ Objected to by counsel for defendant as immaterial and not proper cross-examination;”

“ General objection to the whole of it;”

“ I object to the reading of it” (the bond);

“ Counsel for defendant objects to the parts of the bond being read to the jury that have been marked by the court.”

None of such objections raised the question of the competency of such evidence to show the interest of the witness.

Objections to evidence on the ground of its being incompetent can not be raised for the first time upon appeal. If not made in the trial court, the objection will be treated as having been waived. *Doty v. Doty*, 159 Ill. 46; *Warren v. Warren*, 105 Ill. 568.

Moreover, the trial judge expressly ruled that the bond was not competent in any respect, except as affecting the credibility of the witness, and that he would so instruct the jury, but appellant asked no instruction of that kind. “ Appellant can not complain that this was not done, unless he shows by the record that the court was called upon thus to advise the jury, and refused so to do.” *Imperial Fire Ins. Co. v. Shimer*, 96 Ill. 580.

Upon the subject of the amount of damages there can be but little said. If the appellee were injured as seriously and permanently in both mind and body, as the evidence tends to prove, the judgment is not excessive.

All other questions argued by the appellant have been discussed by the Supreme Court in its opinion (168 Ill. 551) and concluded favorably to the appellee, with reason and

authority beyond our power to add to, and we need only refer to that case for answer to all of appellant's contentions not above discussed.

Finding no available error in the record, the judgment is affirmed.

City of Chicago v. John Sergeant Cram.

1. INSTRUCTIONS—*Erroneous Modifications*.—Where an instruction as tendered, is accurate, properly informing the jury as to the measure of the plaintiff's damages, but is modified by the court so as to practically eliminate the main defense, it is erroneous.

Trespass on the Case, for damages to real estate. Trial in the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed March 16, 1899.

This is an action on the case brought by appellee, holding the legal title as trustee to certain lots of land, for damages to the same on account of the construction by the city of a viaduct or elevated roadway, which extends in front of the lots. Before the construction and operation of the viaduct, there was a horse-car line on the street in front of some of the lots in question, and passengers thereon, going either north or south of certain steam railroad tracks which crossed the street which fronted the lots, were obliged to cross the steam railroad tracks on foot and take a different car upon the other side. The evidence discloses that passengers thus crossing, and waiting for street cars, were in the habit of patronizing the business conducted in stores and saloons upon the property in question, thus increasing the value of buildings for business purposes upon such lots. By the construction of the viaduct, the changing of cars at this point was obviated, and a consequent loss of business and rental value in the premises there might result. There was also evidence to show that the value of the property in question was greatly decreased and cheapened before the

City of Chicago v. Cram.

construction of the viaduct, by the presence of the grade crossings of the steam railroad tracks. A verdict assessing the damages of appellee at \$5,000 was returned. From judgment upon that verdict this appeal is prosecuted.

CHARLES S. THORNTON, corporation counsel, and THOMAS J. SUTHERLAND, attorneys for appellant.

MASON BROTHERS, attorneys for appellee; HENRY B. MASON, of counsel.

MR. JUSTICE SEARS delivered the opinion of the court.

Counsel for appellant present various grounds of objection to the procedure and the judgment. We are of opinion that there is no merit in any of them, except such as go to the instructions.

It is objected that the court erred in modifying the second instruction presented by appellant. The instruction as tendered was accurate, properly informing the jury as to the measure of appellee's damages, if any. The modification consisted in the addition to the instruction of these words:

"Any result of the trolley cars since the viaduct was built, or any result of obstruction by the railroad before the viaduct was built, is not to be considered."

It was doubtless the intention of the learned trial judge to thereby exclude from the consideration of the jury any temporary advantage which the property enjoyed before the construction of the viaduct by reason of the necessary change of cars at that point by street car passengers, and the custom of such passengers while waiting for cars to patronize the saloons and other places of business conducted upon the property in question. If the effect of the instruction upon the jury could be safely said to have been limited to this consideration alone, appellant could not complain, for there could then have resulted no prejudicial effect to it. But the difficulty is, that it can not be judicially determined that the jury so limited the application of the instruction. There was evidence showing that the value of the property

before the construction of the viaduct was unfavorably affected and cheapened by the presence of the grade crossings of the railroad tracks. The instruction told the jury that they might take the value before the improvement, freed from any disadvantage which resulted to it by railroad obstructions. Thus the main defense of the appellant was practically eliminated from the case; for the appellant's meritorious defense, so far as appears from this record, amounted only to a contention that the construction of the viaduct was in its total effect a benefit rather than a damage, because it removed the obstruction of the grade crossing.

The instruction would have been equally open to objection by appellee, if limited in its effect to the excluding of the temporary advantage of patronage of the saloons and stores by passengers upon the street cars. The advantage to the property in this regard was perhaps merely a temporary advantage, but its temporary character had its effect in fixing the fair cash market value of the property before the construction of the viaduct. The jury were to take that fair cash market value as they found it to be before the construction of the viaduct, and were not to reduce it further by again subtracting an element of temporary advantage, which must be presumed to have already had the effect only in determining value which its temporary character warranted.

The tenth instruction given for appellee should be qualified by the words "or decrease," so that it would cover the contingency of a finding by the jury that there had been some decrease in value from causes other than the construction of the viaduct.

We find no error prejudicial to appellant in other rulings upon instructions. Some of the refused instructions were substantially included in instructions given, and others were properly refused. The thirteenth instruction refused is an accurate statement of the law, but we fail to see how its exclusion could have harmed appellant.

Because of the modification of the second instruction tendered by the appellant, the judgment is reversed and the cause remanded.

Brewer & Hoffman Brewing Co. v. Boddie.

80a	353
82	351
80a	353
181a	622

Brewer & Hoffman Brewing Company v. John T. Boddie.

Error to the Superior Court of Cook County.

Alleged error in refusal to allow a change of venue can not be reviewed upon appeal, unless the motion and affidavits in support of it appear in the bill of exceptions. *Anderson Transfer Co. v. Fuller*, 174 Ill. 221.

A corporation having entered into a written lease, occupied the premises and paid rent under the lease, is estopped from setting up in defense to an action against it for rent accrued under the lease, that its charter limitations forbid its performance of its contract—the contract being one not prohibited by law. *Heims Brewing Co. v. Flannery*, 137 Ill. 309; *Standard Brewing Co. v. Kelly*, 66 Ill. App. 267; *Keeley Brewing Co. v. Emrick*, 64 Ill. App. 247; *Nat. Brewing Co. v. Ahlgren*, 63 Ill. App. 475. Affirmed.

Opinion filed March 14, 1899.

L. A. GILMORE and M. M. JACOBS, attorneys for plaintiff in error; EDWARD MAHER and CHARLES C. GILBERT, of counsel.

LOESCH BROTHERS & HOWELL, attorneys for defendant in error.

George F. Harding v. Amalia Kuessner.

Appeal from the Superior Court of Cook County.

This was an appeal from an interlocutory order. The only question involved is the sufficiency of a creditor's bill. Affirmed on authority of *Bowen v. Parkhurst*, 24 Ill. 257; *First Natl. Bank v. Gage*, 79 Ill. 207; *Dormueil v. Ward*, 108 Ill. 216; *Edwards v. Rogers*, 41 Ill. App. 405.

Opinion filed January 26, 1899.

WM. J. AMMEN, attorney for appellant.

NELSON MONROE, attorney for appellee.

Isadore Plotke v. The Estate of E. L. Negley et al.

Appeal from the County Court of Cook County.

Bill of exceptions does not purport to contain all the testimony. The certificate of the clerk of the trial court does not purport to give a transcript of the record upon that branch of the case involved in this appeal. Affirmed.

Opinion filed February 14, 1899.

W. A. MARSH, solicitor for appellant; G. W. AMBROSE, of counsel.

ROSENTHAL, KURZ & HIRSCHL, attorneys for appellees.

Chicago City Railway Company v. Thomas Leach.

1. **FELLOW-SERVANTS—*Allegation Denying Relationship—When Not Necessary.***—An allegation denying the relationship of fellow-servants is not necessary where the facts showing the relationship are stated in the declaration. It is never necessary to plead conclusions of law arising upon given facts.

2. **SAME—*When a Question of Fact and When of Law.***—Whether or not, under given circumstances, servants of a common master are fellow-servants, is a question of fact for the jury, except where, upon conceded facts or conclusive or uncontradicted evidence, the court can say that all reasonably intelligent minds must arrive at the same conclusion, then the question becomes one of law. If different minds may honestly draw different conclusions from the facts in evidence and legitimate inferences may be drawn therefrom, a case exists for the jury to act upon.

3. **SAME—*Duty of Court to Instruct Jury—Question of Fact.***—It is the duty of the court to instruct the jury as to what constitutes the relationship of fellow-servants, but whether the circumstances of a given case fall within the rule of law, is a question of fact for the jury, unless where the facts are so clear as to make the question one of law only.

4. **SAME—*Rule in Illinois.***—The rule of law in this State is, "Where one servant is injured by the negligence of another servant, where they are directly co-operating with each other in a particular business in the same line of employment, or their duties are such as to

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80b 354
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bring them into habitual association, so that they exercise a mutual influence upon each other promotive of proper caution, and the master is guilty of no negligence in employing the servant causing the injury, he is not liable."

5. **LIMITATIONS**—*What is Not a Statement of a New Cause of Action.*—A varied description of the negligence that occasions the injury and gives rise to the cause of action, is never of itself the statement of a new cause of action.

6. **PLEADING**—*One Good Count Sufficient.*—If there is one good count in the declaration, and evidence enough applicable thereto to sustain a verdict, the judgment will not be reversed except for intervening errors of law.

7. **MASTER AND SERVANT**—*One Servant Injured by Negligence of Another.*—Where employes of the common master are not co-operating as fellow-servants, and one is injured by the negligence of another servant, the common master is liable.

8. **ATTORNEYS**—*Improper Remarks of Counsel.*—Where remarks of counsel in argument to the jury, from an ethical standpoint ought to be condemned, this court will not hesitate, when in close cases the necessity arises, to perform the duty which the court below should have performed.

9. **DAMAGES**—*When \$16,500 is Not Excessive.*—Where a man forty-five years old, in good health and vigor and with the prospects of the average American who has to make his own career, is injured to the extent that his capacity for every kind of employment has been for all time seriously impaired, and his ability to get ahead in life almost ended, a judgment of \$16,500 should not be disturbed because of being excessive only.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the October term, 1897. Affirmed, if remittitur is entered, otherwise reversed and remanded. Remittitur filed and cause affirmed March 17, 1899. Opinion filed March 14, 1899.

W. J. HYNES, S. S. PAGE, and H. H. MARTIN, attorneys for appellant, contended that the two causes of action set out in the two counts are distinct and separate causes of action, and that the plea of the statute of limitations to the second additional count was good, and that the trial judge erred in sustaining appellee's demurrer to it. *Smith v. The Missouri Pacific R. R. Co.*, 50 Fed. Rep. 760.

The conclusive reasoning and decision of the court in *Smith v. R. R. Co.*, 50 Fed. Rep., *supra*, is supported by the

numerous decisions in this State in which this court and the Supreme Court have held that if the issues presented by the two counts are different—if different evidence would be needed to sustain the one from that necessary to sustain the other, then the causes of action are different, and the statute of limitations will run against the new count. *Richter v. Ins. Co.*, 66 Ill. App. 606; *Fish v. Farwell*, 160 Ill. 236; *Phelps v. R. R. Co.*, 94 Ill. 548; *C. B. & Q. v. Jones*, 149 Ill. 361; *R. R. Co. v. The People*, 19 Ill. App. 141; *U. P. Ry. Co. v. Wyler*, 158 U. S. 285; *Bolton v. R. R. Co.*, 83 Ga. 659; *A. T. & S. Fe R. R. Co. v. Schroeder*, 56 Kan. 731; *Gorman v. The Judge, etc.*, 27 Mich. 138; *Buntin v. Ry. Co.*, 41 Fed. Rep. 744; *R. R. Co. v. Ledbetter*, 9 So. Rep. 73; *R. R. Co. v. Smith*, 81 Ala. 229; *R. R. Co. v. Scott*, 41 Am. & Eng. R. R. Cases, 396; *R. R. Co. v. Donovan*, 65 N. W. Rep. 583.

No inference that Golden was in fact incompetent can properly be drawn from the mere happening of a particular accident. *Hathaway v. I. C. Ry. Co.*, 60 N. W. Rep. 651; *Sullivan v. R. R. Co.*, 62 Conn. 209; 1 Wharton on Neg. (2d Ed.), Sec. 240; *Gier v. L. & A. Electric Ry. Co.*, 108 Cal. 129; *Cooper v. M. & P. Ry. Co.*, 23 Wis. 669; *Lee v. Detroit B. & I. Works*, 62 Mo. 565.

It is a well established general rule that evidence of reputation as to a fact is never admissible as evidence to prove the existence of such fact; that such reputation evidence is only admissible in cases where it is material to establish notice of a fact whose existence has been otherwise proved; that when so admissible, such reputation evidence can be used only to show such notice and not the existence of such fact; and that where such notice is not a material issue, such evidence of reputation is not admissible at all. 1 Wharton on Ev., Sec. 252; *Gilman v. R. R. Co.*, 13 Allen, 433; *Malcolm v. Fuller*, 152 Mass. 160; *Fake v. Addicks*, 45 Minn. 37; *Ashbrook v. Dale*, 27 Mo. App. 649; *O'Neill v. R. R. Co.*, 15 N. Y. Supp. 84; *Bliss v. Johnson*, 162 Mass. 324; *Branch Bank v. Parker*, 5 Ala. 731; *Cleveland Woolen Mills v. Sibert*, 81 Ala. 144.

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While proof of notoriety of a fact in a community in which a party resides is admissible, for the purpose of bringing home to such party notice thereof, the materiality and relevancy of the particular fact, and *prima facie* evidence of its existence, other than general reputation, are preliminary and requisite. *Kuglar v. Garner*, 74 Ga. 765; *Adams v. Slate*, 25 O. St. 584; *Conover v. Berdine*, 69 Mo. 125; *Whitney v. Gross*, 140 Mass. 232; *Dunham v. Rackliff*, 71 Maine 345; *B. & O. R. R. Co. v. Colvin*, 118 Pa. St. 230; *Williams v. Edmunds*, 75 Mich. 92; *Boich v. Bissell*, 80 Mich. 260; *Trowbridge v. Wheeler*, 1 Allen, 162.

WING, CHADBOURNE & LEACH and JAMES C. McSHANE, attorneys for appellee.

It is a well-settled rule that a servant can recover from the master for combined negligence of the master and of a fellow-servant. *C., B. & Q. R. R. v. Blank*, 24 Ill. App. 446; *Cooley on Torts*, 560.

In *Thomas v. Ry. Co.*, 8 Fed. Rep. 732, it is said: "The law will never hold it imprudent in any one to act upon the presumption that another in his conduct will act in accordance with the rights and duties of both." Citing *Newson v. N. Y. C. R. R. Co.*, 29 N. Y. 383; *Liddy v. St. L. R. R. Co.*, 40 Mo. 507; *Langhoff v. M., etc., Ry. Co.*, 19 Wis. 515; *Hegan v. Eighth Av. R. R. Co.*, 15 N. Y. 383; *Penn. R. R. Co. v. Ogier*, 35 Pa. St. 60, 72.

Where one servant is injured by the negligence of another servant of the common master, but not within this description of fellow-servant, the master is liable. *Joliet Steel Co. v. Shields*, 134 Ill. 213; *Chicago & Alton Railroad Co. v. May*, Adm'x, 108 Ill. 288; *Chicago & Northwestern Ry. Co. v. Snyder*, 117 Ill. 376; *Chicago & Alton Railroad Company v. Kelly*, 127 Ill. 637; *Joliet Steel Co. v. Shields*, 146 Ill. 605.

The definition of fellow-servant may be a question of law, but it is always a question of fact to be determined from the evidence whether a given case falls within that definition, and it was the duty of the court to submit it to

them with proper instructions. Ind. & St. L. R. R. Co. v. Morgenstern, 106 Ill. 216.

It has been frequently announced by the Supreme Court that the question as to who are fellow-servants is so clearly a question of fact that our Appellate Courts are courts of last resort upon this question. I. C. R. R. Co. v. Reardon, 157 Ill. 372; Chi. & W. R. R. Co. v. Flynn, 154 Ill. 448.

Whether the facts be disputed or undisputed, if different minds might honestly draw different conclusions from them, the case must be left to the jury. Sioux City & P. R. Co. v. Stout, 17 Wall. 657.

To constitute servants of the same master fellow-servants within the rule *respondeat superior*, it is not enough that they are engaged in doing parts of the same work, or in the promotion of the same enterprise carried on by the master not requiring co-operation, or bringing them together, or in such relations as they might have an influence upon each other, but it is essential that at the time it is claimed such relations exist, they shall be directly co-operating with each other in the particular business in hand. C. & A. R. Co. v. O'Brien, 53 Ill. App. 198; affirmed in 155 Ill. 630.

Whether one act of negligence is sufficient to establish the incompetency of a servant depends upon the character of the act. McDermott v. Hannibal & St. J. R. R. Co., 87 Mo. 285; Baulec v. N. Y. & H. R. R. Co., 59 N. Y. 356.

In order to take advantage of improper remarks of counsel it is necessary that the court's ruling be obtained thereon and an exception taken to its ruling, which was not done in this case. West Chicago St. R. R. Co. v. Annis, 165 Ill. 476; N. Chicago St. R. R. Co. v. Gillow, 166 Ill. 444.

No more delicate question for decision can be raised than the propriety of the conduct of counsel in the trial of cases, and it is gratifying to know that the sense of professional propriety is generally such that courts seldom need interfere. When, however, the necessity arises, trial courts should not hesitate to use their authority to restrain all efforts of attorneys to obtain verdicts by using unfair means and making remarks outside of the evidence, calculated only

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to arouse the prejudice and passions of the jury; and whenever such restraining influences do not effect the purpose, the fruits of such unprofessional conduct ought to be taken away by granting a new trial. It is, however, as held in the Cotton case, *supra*, a matter resting in the sound discretion of the trial judge to say when, under all the circumstances of the case, and in view of the counter remarks which may be made and the temper and character of the jury, whether a new trial should be granted or not, and unless it satisfactorily appears from the record that the trial court has abused its discretion in this regard, courts of review can not interfere. *West Chicago St. R. R. Co. v. Annis*, 165 Ill. 476.

The doctrine of amendments prevailing in this State is different from that which prevails elsewhere, hence the authorities of other States throw but little light upon the question. The following authorities abundantly sustain our position: *Swift & Co. v. Madden*, 63 Ill. App. 344; 165 Ill. 41; *I. C. R. R. v. Wieland*, 67 Ill. App. 338; *Chicago & N. Ry. Co. v. Traves*, 17 Ill. App. 136; *Liebold v. Green*, 69 Ill. App. 529; *Stearns v. Reidy*, 33 Ill. App. 246.

Error in refusing to instruct the jury to disregard certain counts in a declaration is harmless, where there is one good count in the declaration to which the evidence is applicable, and which is sufficient to sustain the judgment. *C. & A. R. R. Co. v. Anderson*, 166 Ill. 572; *Con. Coal Co. v. Scheiber*, 167 Ill. 539; *West Chic. St. R. R. Co. v. Feldstein*, 169 Ill. 140.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The appellee sued the appellant in case for personal injuries suffered by him, and recovered a verdict and judgment for \$16,500 as and for his damages.

The appellee was a conductor in the employment of appellant, having in charge two cars, a grip-car and trailer, operated over the Wabash avenue and Cottage Grove avenue line of appellant's road.

The train had come north, and going around the loop,

from Madison street along Michigan avenue to Randolph street, had about reached the intersection of the latter street and Wabash avenue, there to begin its return trip southwardly. At that point the train was stopped, and appellee went underneath, between the grip-car and trailer, to tighten a draw-bar that needed it. While so situated and engaged, and within a minute and a half to three minutes after he had gone in between the cars, another train, running upon the same track and operated by a gripman named James Golden, ran into the hind end of appellee's train with such force as to spring its brake, that had been set, and drive it around the curve to and upon Wabash avenue, a distance of about seventy feet, before it could be stopped. Appellee was caught underneath the train and dragged the whole distance, receiving very serious as well as permanent injuries. When Golden's train first turned the corner of Michigan avenue and Randolph street, he came within plain sight of appellee's train standing still, about three hundred feet ahead of him, and there was the evidence of apparently impartial witnesses that he made no effort to stop or slacken the speed of his train until close upon appellee's train, and that instead of looking ahead, as he should have done, he was looking away in another direction until too late.

When finally submitted to the jury, there remained in the case but three counts to the declaration, to wit, the first original count and the first and second additional counts.

It is argued that it was error to sustain demurrers filed by appellee to appellant's plea of the statute of limitations to the first and second additional counts.

Both of said counts were filed after the statute had run against a suit upon a new and different cause of action from that stated in the original declaration.

Said first additional count set up for the first time that appellee and Golden were not fellow-servants. In other respects it was not unlike, in substance, the first original count.

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An allegation denying the relationship of fellow-servants is not necessary where the facts showing the relationship that did in fact exist are stated in the count, as was done here. It is never necessary to plead conclusions of law arising upon given facts. *C. & A. R. R. Co. v. Swan*, 176 Ill. 424.

Here, in this first additional count, it was alleged that appellee was conductor of one train of cars, and that appellant's other servant, by whose negligence appellee was injured, was the gripman in charge of and operating another and different train of cars. The further allegation that he was not a fellow-servant of appellee was, therefore, not necessary, and added no force to the count. *Louisville, E. & St. L. R. R. Co. v. Hawthorn*, 147 Ill. 233.

No new cause of action was set up in said count, and there was no error in sustaining the demurrer to the plea of the statute of limitations thereto.

The second additional count set up the incompetency of Golden as a gripman, known to or within the knowledge of appellant. Was such averment the statement of a new cause of action, or was it only a statement in a different way of the same cause of action originally declared upon?

The cause of action was the injury to appellee, occasioned by the negligence of appellant or its servants. The negligence by which the injury resulted might consist in one element or another, and might be stated in as many respects as the pleader should choose. The count in question was upon the same injury stated in the earlier counts, and only varied from them in stating in a new way the circumstances constituting the negligence, to wit, the employment of an incompetent servant, by whose offense the injury happened. A varied description of the negligence that occasions the injury and gives rise to the cause of action, is never of itself the statement of a new cause of action.

The demurrer to the plea was rightly sustained. *Swift v. Foster*, 55 Ill. App. 280; same case, 163 Ill. 50.

(For an interesting, and sometimes, instructive opinion upon causes of action and amendments to declarations, see *Ellison v. Georgia R. R. Co.*, 87 Ga. 691.)

If, however, the plea of the statute of limitations to the count we have been last considering ought to have been upheld, it would not materially aid the appellant, if the declaration stated a good cause of action in another count, and the evidence applicable thereto were sufficient to sustain it.

If there be one good count in the declaration, and there be evidence enough applicable thereto to sustain the verdict, the judgment will be upheld, except for intervening errors of law. Ch. 110, Sec. 58, Rev. Stat., Hurd's Ed. of 1898; C. & A. R. R. Co. v. Anderson, 166 Ill. 572; Consolidated Coal Co. v. Scheiber, 167 Ill. 539.

We may, therefore, lay aside all consideration of Golden's incompetency as a gripman, set up by the second additional count, until the other counts and the case made under them shall be considered.

If appellee has fairly established by the evidence that Golden (though not an incompetent gripman) so negligently managed the train, of which he was the gripman, as to cause the injury complained of, that appellee was in the exercise of due care for his own safety, and did not contribute to the accident, and did not by his employment assume the risk of the accident, and that Golden and appellee were not fellow-servants, a case is made out under one or the other, or both, of the two remaining counts.

At the instance of appellant, there were submitted to the jury seven special questions, three of which bore directly upon the question of appellee's care of himself, and one upon whether he and Golden were fellow-servants.

Those interrogatories and the jury's answers thereto, were as follows:

"Fourth. According to the greater weight of the evidence was it necessary to the safe operation of his train for the plaintiff to adjust the draw-bars in question at the time and place of the accident?

Answer. Yes.

Sixth. In placing himself in the position that he did between the cars in question shortly before the accident, at the time and place and under the circumstances and his sur-

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roundings, as shown by the evidence, and the time that he continued in such position, as shown by the evidence, was the plaintiff guilty of want of ordinary care and caution for his own personal safety?

Answer. No.

Twelfth. Under the evidence, could the plaintiff by the exercise of ordinary care and prudence for his own personal safety, have avoided the injury in question?

Answer. No.

Thirteenth. According to the greater weight of the evidence, were the gripman James Golden and the plaintiff fellow-servants in the service of the defendant at the time of the injury in question?

Answer. No."

The general verdict was in harmony with the answers given by the jury to the special questions, and the evidence was ample to justify the answers to the "fourth," "sixth" and "twelfth" of such questions.

The answer to the "thirteenth" question, as to whether the relationship of fellow-servants existed between the appellee and Golden, is not so certainly right.

But whether or not, under given circumstances, different servants of a common master are fellow-servants, within the legal signification of that term, is well settled, in Illinois, to be a question of fact for the jury, except where, upon conceded facts or conclusive or uncontradicted evidence, the court may say that all reasonably intelligent minds must arrive at the same conclusion, when, in such cases, the question would become one of law. If different minds may honestly draw different conclusions from the proved facts and legitimate inferences to be drawn therefrom, a case exists for the jury to act upon.

It is the duty of the court to define and instruct the jury as to what in law constitutes the relationship of fellow-servants, but whether the circumstances of a given case fall within the rule of law so laid down, is a question of fact for the jury, unless where, as above said, the proved or conceded facts are so clear as to make the question one of law only.

The three late cases, C. & E. I. R. R. Co. v. Driscoll, 176

Ill. 330; C. & A. R. R. Co. v. Swan, 176 Ill. 424, and Westville Coal Co. v. Schwartz, 177 Ill. 272, are all that need to be referred to in such connection.

The rule of law in this State, based upon the Moranda case (93 Ill. 302), stated in C. & E. I. R. R. Co. v. Kneirim, 152 Ill. 458, is that "Where one servant is injured by the negligence of another servant, where they are directly co-operating with each other in a particular business in the same line of employment, or their duties being such as to bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution, and the master is guilty of no negligence in employing the servant causing the injury, the master is not liable."

And the rule, so stated, was last approved in C. & A. R. R. Co. v. Swan, *supra*, where it was held that the qualifying words, "so that they may exercise a mutual influence upon each other promotive of proper caution," applies to the first test, "where they are directly co operating with each other in a particular business in the same line of employment," as well as to the second test, where "their duties being such as to bring them into habitual association."

It necessarily follows, as held in the Moranda case, and in Joliet Steel Co. v. Shields, 134 Ill. 209, and other cases, that where servants are not so co-operating or brought into association, or, in other words, where one servant is injured by the negligence of another servant of the common master but not within the above description or definition of fellow-servant, the master is liable.

There was very little conflict in the evidence on this point, although there is opportunity for a wide difference in the inferences to be drawn therefrom. Besides the circumstances already stated, that appellee was conductor of one train and Golden was gripman of another and independent train, both serving the same master, there was evidence tending to show that about a thousand other men worked for appellant, either as conductors or gripmen, upon the same line of road; that there were a great many trains run; that there was

not necessarily any association between the men constituting the crew of one train and those of another; that the train hands frequently changed, and there was no regularity in their association on trains, or in the order in which trains or crews followed one another; that appellee had worked for appellant as a conductor for fifteen or sixteen months, and on this particular line or division of the road for about six months, and that he and Golden had never worked upon the same train and were personally unacquainted.

It was upon such evidence, in part, that the jury acted in determining whether or not the relationship of fellow-servants existed between the appellee and Golden, and we can not fairly say their conclusion was a mistaken one.

The questions of whether the accident was due to the negligence of Golden, whether appellee was guilty of contributory negligence, by a failure to exercise ordinary care for his own safety, or otherwise, and whether there was an assumption of risk by appellee, were all found in favor of appellee, by necessary intendment of the verdict.

We have examined the record with great care upon each one of such questions, and we agree with the jury and trial judge concerning them. Under the evidence there can be but little hesitation in holding that the jury decided all such questions rightly.

In view of what has been said, we need not consider further, either the evidence or appellant's refused instructions, concerning the incompetency of Golden as a gripman. The judgment does not depend upon that aspect of the case.

Nor was there any substantial or harmful error in regard to other instructions, unless in the respect hereinafter to be discussed.

The remarks of counsel in argument to the jury are much complained of, and from an ethical standpoint ought to be condemned. Although the trial judge is, as a general rule, the proper protector of the rights of litigants from abuses in such respects, this court will not hesitate, when in close cases the necessity arises, to perform the duty which the court below should have performed. We have done it

before and will do it again if necessary. But the abuse of discretion vested in the trial judge can not be clearly seen to have been so harmful in this case as to call for us to reverse the judgment on that account. *W. C. St. R. R. Co. v. Annis*, 165 Ill. 475.

The judgment upon the verdict, for \$16,500, is for a large sum, but it would be mere guesswork for us, under the evidence, to say how much less a sum would be full compensation. Appellee was forty-five years old when hurt. He was in good health and vigor before. His wages were from \$80 to \$90 a month. He had previously been a farmer, an employe in a country lumber yard, a postmaster for one term in a small village, and seems by experience and capacity to have had before him the prospects of the average American who has to make his own career. It may be true that his capacity for every kind of employment has not been destroyed, but, from the evidence, we believe it has been for all time so seriously impaired, and his ability to get ahead in life so fully ended that the judgment should not be disturbed because of being excessive, only.

The appellant asked an instruction as follows:

"The jury are instructed that they can not allow the plaintiff for any expenses for medical attendance up to date," which the court modified by adding thereto, "unless such, if any, as has been shown by the evidence to have been necessarily expended and incurred," and, as modified, gave it.

In both, the first and second additional counts to the declaration, it was alleged that the appellee "was compelled and did lay out divers large sums of money, amounting to, to wit, \$500, in and about endeavoring to be cured," etc.

Perhaps the only medical treatment rendered to appellee, except such as was inferentially done by friends at home, was in hospital, and there was no evidence that such treatment ever cost appellee anything or that he incurred any liability therefor. There is an inference from appellee's testimony, that he paid, or incurred debt, for the med-

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icines used by him after leaving the hospital, but that is all. We think the instruction should have been given without the modification, but inasmuch as the only possible effect of the modification was to enhance the damages by, perhaps, the amount alleged in the declaration as having been expended, we regard the error as susceptible of cure by remittitur.

We see nothing else in the record to require particular mention, although there are minor matters discussed in appellant's brief.

If appellee shall, within ten days, file in this court a remittitur of five hundred dollars, as of the date of the judgment, the judgment for the balance will be affirmed at appellee's costs; otherwise, the judgment will be reversed and the cause remanded. If remittitur entered, affirmed; otherwise reversed and remanded.

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1. NEW TRIALS—*When Motion for, is Unnecessary.*—A motion for a new trial when a case is tried without a jury is unnecessary, and so is an exception to the overruling of such a motion.

2. FINDING—*Sufficient Under the Statute of Jeofails.*—A verdict that states "The court finds the issues for the plaintiff and assesses the plaintiff's damages at the sum of \$840," is good in substance, and sufficient under the statute of jeofails.

8. BILL OF EXCEPTIONS—*Where it Shows no Exceptions—Practice.*—Where an abstract states that the defendant excepted to the judgment, but the bill of exceptions shows no such exception, this court is precluded from inquiring whether the finding of the court is sustained by the evidence.

Trespass on the Case, for seizure of personal property. Trial in the County Court of Cook County; the Hon. R. O. MARSHALL, Judge, presiding; finding and judgment for plaintiff; appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed December 12, 1898. Rehearing denied, March 16, 1899.

LOUIS HENRY and MAX ROBINSON, attorneys for appellant.

JOHN J. COBURN and GEORGE A. MEECH, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This case was tried, by agreement, by the court, without a jury. Appellant contends that the finding is contrary to the evidence. The abstract filed by appellant states that the defendant (appellant here) excepted to the judgment. The bill of exceptions shows no such exception. In such case we are precluded from inquiring whether the finding of the court is sustained by the evidence. Ill. Cen. R. R. Co. v. O'Keefe, 154 Ill. 508; Seavey v. Seavey, 30 Ill. App. 625, 637.

A motion for a new trial was made and overruled, and appellant excepted, but such motion, when a case is tried by the court, is unnecessary, and the exception to the overruling can not avail appellant. Sands v. Kagey, 150 Ill. 109; Dickinson v. Gray, 72 Ill. App. 55.

Appellant's counsel object to the form of the court's finding, which is: "The court finds the issues for the plaintiff, and assesses the plaintiff's damages at the sum of \$340." An informal verdict does not vitiate. The finding is good in substance, and is sufficient under the statute of jeofails, and may be regarded as reduced to form. I. C. R. R. Co. v. Wheeler, 149 Ill. 525; Wiggins v. Chicago, 68 Ib. 372; Bates et al. v. Williams, 43 Ib. 494.

The proposition, the refusal of which appellant's counsel complain of in their argument, relates merely to the sufficiency of the evidence, which, as before stated, we can not consider on the record before us. There is no other question of law presented.

The judgment will be affirmed.

Ferdinand Walther v. James Abbott.

Appeal from the Circuit Court of Cook County.

In an action to recover for personal injuries, brought by a passenger against a carrier, the refusal to hold as a propo-

Fowler v. Chicago Title & Trust Co.

sition of law that if the plaintiff was guilty of negligence which in any degree contributed to the injury complained of, he could not recover, unless the negligence of the defendant was malicious and willful or wantonly reckless; and the modifying of another like proposition of law by inserting the words "a material" in lieu of "any," preceding the word "degree," and holding it, as modified, to be the law, was substantial error, where there was a close contest upon the merits of the case. Cicero & Proviso St. R. R. Co. v. Snider, 72 Ill. App. 300; C. C. Ry. Co. v. Canevin, 72 Ill. App. 81.

Reversed and remanded.

Opinion filed March 14, 1899.

ARTHUR SCHROEDER, attorney for appellant.

BRANDT & HOFFMANN, attorneys for appellee.

Frank T. Fowler v. Chicago Title & Trust Co., Assignee.

Appeal from the County Court of Cook County.

This was an appeal from the County Court. The question involved was whether the appellant was entitled, as purchaser at a sale by the assignee, of a certain account on which it was alleged there was a balance due the insolvent estate. The court found against the appellant. The question was mainly one of fact. The judgment was reversed and the cause remanded with directions.

Opinion filed February 23, 1899.

TENNEY, McCONNELL, COFFEEN & HARDING, attorneys for appellant.

SMITH, HELMER, MOULTON & PRICE, and CONRAD H. POPPENHUSEN, attorneys for appellee.

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Mary W. Weaver v. Fannie F. Weaver.

1. **GIFTS—*What Constitutes an Effective Gift of an Insurance Policy.***—It is not essential to an effective gift that the custody of the policy itself be delivered into the hands of the assignee. The declared intent of the donor, the execution and acknowledgment of the deed of assignment, the delivery of a duplicate thereof to the insurance company, with notice to the donee that it had been done, are sufficient to constitute a complete and effective gift.

2. **INSURANCE—*Gift of a Policy—Actual Delivery Not Necessary.***—Actual delivery of the writing into the hands of the donee is not essential to constitute an effective gift of insurance.

3. **DELIVERY—*Of Deed—No Set Form Necessary.***—There is no precise or set form in which a delivery must be made. A deed may be delivered by words without acts, or by acts without words, or by both acts and words. After the writing has been signed and sealed, an intent, coupled with acts or words evincing such intent, to consummate and complete it, and to part absolutely and unconditionally with it and the right over it, is sufficient to give it legal existence as a deed.

Interpleader.—Trial in the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Finding and decree for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Reversed and remanded with directions. Opinion filed March 16, 1899.

On December 20, 1882, Edward L. Weaver obtained a policy of life insurance upon his life for the amount of \$2,000. On December 16, 1891, said Weaver intermarried with appellee. After the marriage, and on October 8, 1892, Weaver assigned, or undertook to assign, the policy to his mother, appellant. On May 9, 1897, about fifteen or twenty minutes before his death, Weaver assigned, or undertook to assign, the same policy to his wife, appellee. The assignment to the appellant was by a written deed of assignment, signed, sealed and acknowledged before a notary public. It was executed in duplicate. One of the duplicates was delivered by Weaver to the insurance company. What was done with the other duplicate is not disclosed. At the time of making this assignment, Weaver notified his mother, appellant, that he had made the assignment to her, and that he would hold for her the assignment and the policy.

Weaver v. Weaver.

The assignment to appellee was also by deed of assignment executed a few minutes before Weaver's death. After signing the written assignment, he directed it, with the policy, to be delivered to appellee.

There is no question raised as to the fact of the second assignment to appellee having been complete and effective, had it not been for the prior assignment to appellant. The question presented, and the only question, was as to the sufficiency of the first assignment, viz., the assignment to appellant.

This question was presented to the trial court upon a bill of interpleader exhibited by the insurance company and answers thereto by appellant and appellee. The prayer of the bill was granted, and upon a former trial between appellant and appellee, the trial court decreed in favor of appellee. An appeal was prosecuted to this court, and the decree was reversed and the cause remanded for another trial. *Weaver v. Weaver*, 73 Ill. App. 301.

The ground of reversal was the exclusion by the trial court of certain evidence proffered by appellant, tending to show intent of Weaver at the time of the first assignment.

Upon a second trial this evidence was admitted, and the trial court again entered a decree for appellee. From that decree this appeal is prosecuted.

HOLDEN & BUZZELL, attorneys for appellant; Wm. H. HOLDEN, of counsel.

The only paper requiring a delivery to make it effectual was the assignment; a delivery of the policy would not pass any interest in it, and the assignment having been delivered, the possession afterward of a duplicate of it and of the policy by the assignor has no effect upon the operation of the assignment.

In a gift by parol, only, is the delivery of the thing given essential. *Ewing v. Ewing*, 2 Leigh (Va.), 343; *Carpenter v. Soule*, 43 Sickels (88 N. Y. 257); *Matson v. Abbey*, 70 Hun, 477; *McCutchen v. McCutchen*, 9 Porter (Ala.), 650; *Walker*

v. Crews, 73 Ala. 415; Crawford v. Bertholf, 1 N. J. Eq. 458; Bunn v. Winthorp, 1 Johns. Chy. 329; Reed v. Douthit, 62 Ill. 348; Fulton v. Fulton, 48 Barb. 590.

To notify the debtor to a non-negotiable written contract of an assignment thereof in the manner made known by him as satisfactory, might, in the absence of the delivery of the assignment to the donee, well be regarded as one of the most important steps in the transfer, in determining whether or not, by the acts of the parties, an equivalent of, or substitute for actual delivery appeared. *Williams v. Chamberlain*, 165 Ill. 220.

The law presumes more in favor of the delivery of deeds, made in the course of voluntary settlements, than it does in ordinary cases of bargain and sale. *Winterbottom v. Pattison*, 152 Ill. 334; *Reed v. Douthit*, 62 Ill. 348.

A gift of a chose in action may be made in two ways: By delivery without assignment, or by assignment without delivery of the evidence of the chose in action. 8 Am. & Eng. Ency., 1322-1323; *Matson v. Abbey*, 70 Hun, 477.

ROGERS & MAHONEY and FREDERICK A. WILLOUGHBY, attorneys for appellee, contended that it was essential to the validity of the assignment of the policy to Mary W. Weaver, appellant, that delivery of the assignment or its equivalent should take place. No actual delivery to appellant took place, nor does the evidence show that Weaver performed such other acts looking to the completion of the gift as in cases of actual delivery, as would, under the circumstances, have been equivalent to, or a substitute for, such actual delivery. *Weber v. Cristen*, 121 Ill. 91; Am. and Eng. Enc. Law, 1313; *Palmer v. Merrill*, 6 Cush. 282; *Lemon v. Phoenix M. L. Ins. Co.*, 38 Conn. 294; *Williams, Adm'x, v. Chamberlain*, 165 Ill. 210; *Bristow v. Hall*, 16 Texas, 566; *Riseley v. Phoenix Bank*, 83 N. Y. 318; *William, Adm'r, v. Guile*, 46 Hun, 645.

Nor does the evidence in this case establish a trust. From a mere imperfect gift a trust can not be deduced. *Williams, Adm'x, v. Guile*, 46 Hun, 645; *Badgley v. Votrain*, 68 Ill.

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25; Kingsbury v. Burnside et al., 58 Ill. 310; Stevenson v. Crapnel et al., 114 Ill. 19; 2 Pomeroy's Eq. Jur., Sec. 1044; Lantry v. Lantry, 51 Ill. 458; Biggins et al. v. Biggins, 133 Ill. 218; Young, Adm'r, v. Young et al., 80 N. Y. 422; Clark v. Durand, 12 Wis. 233; Perry v. McHenry, 13 Ill. 236.

MR. JUSTICE SEARS delivered the opinion of the court.

The ground of reversal of the former decree in this case was the exclusion of evidence of declarations made by Weaver at the time of the first assignment, *i. e.*, the assignment to appellant. In deciding the former appeal, this court, speaking through Mr. Justice Windes, said:

“If the fact that this assignment to the mother being sent to the company, that being, as the Supreme Court say, ‘in the manner made known by it as satisfactory,’ and also being, as the same court further say, ‘one of the most important steps in the transfer,’ were considered in connection with the evidence excluded by the court (should that evidence be given as offered and in a manner to impress the court that it is to be believed), we are inclined to the opinion that the whole, taken together, would establish a perfected gift of the policy to the mother, etc. * * * While we are inclined to this view, we do not wish to be understood as holding that the execution and delivery of the duplicate assignment to the company was not sufficient of itself to complete the gift.”

The evidence excluded upon the former trial was admitted upon the trial now in question, and it was, though not literally, yet in substance and effect, as proffered upon the first trial. It established, without conflict or contradiction in the evidence, that, at the time of the making of the first assignment, Weaver, after having signed, sealed and acknowledged before a notary public the deed of assignment, and having delivered a duplicate thereof to the insurance company, then informed his mother, appellant, the donee, of what he had done, and also informed her that he would hold the policy and the assignment for her, and that appellant, in effect, assented to this arrangement.

The question presented and determinative of the cause is, did this, taken together, constitute a valid and effective

assignment of the policy. We are of opinion that it did. We are inclined to view all that which was done by Weaver as constituting an equivalent to actual delivery. It was not essential to an effective gift that the custody of the policy itself be delivered into the hands of the assignee.

There was here no question of gift of a chattel by parol, but the gift is of a chose in action by written deed. The question, therefore, is as to the delivery of the deed of assignment, or an equivalent to actual delivery thereof.

Actual delivery of the writing into the hands of the donee was not essential. *Bryan v. Wash*, 2 Gil. 557; *Masterson v. Cheek*, 23 Ill. 72; *Walker v. Walker*, 42 Ill. 311; *Otis v. Beckwith*, 49 Ill. 121; *Webber v. Christen*, 121 Ill. 91; *Winterbottom v. Pattison*, 152 Ill. 334; *Miller v. Meers*, 155 Ill. 284; *Crabtree v. Crabtree*, 159 Ill. 342; *Williams v. Chamberlain*, 165 Ill. 210; *Martin v. Martin*, 170 Ill. 18; *Fulton v. Fulton*, 48 Barbour, 581; *Folly v. Vantuyt*, 4 Halsted, 153-193; *Fortescue v. Barnett*, 3 Mylne & Keene, 35.

In *Folly v. Vantuyt*, *supra*, the New Jersey court said:

"There is no precise or set form in which a delivery must be made. A deed may be delivered by words without acts, or by acts without words, or by both acts and words. *Shep. Touch.* 58. After the writing has been signed and sealed, an intent, coupled with acts or words evincing such intent to consummate and complete it, and to part absolutely and unconditionally with it and the right over it, is sufficient to give it legal existence as a deed. In *Shelton's case*, Cro. Eliz. 7, the grantor sealed the deed in the presence of the grantee and of other persons, and it was at the same time read, but not delivered, nor did the grantee take it away, but it was left behind them in the same place; yet by the opinion of all the justices it was held a good grant, for the parties came for that purpose and performed all that was requisite for the perfecting it except the actual delivery; but it being left behind them and not countermanded was said to be a delivery in law. In *Hollingworth v. Ascue*, Cro. Eliz., 356, it was said by Anderson, Ch. Just.: 'A delivery may be without words of delivery,' as it hath been adjudged that one made a release and cast it upon the table and said, 'this will serve,' this is a good delivery. *Shepard says, Touch.*, 58: 'If I take the deed in my hand and use these or the

like words, here, take it, or this will serve, or I deliver this as my deed, or I deliver it to you, these are good deliveries.' Lord Coke says, Co. Lit., 36a, a deed may be delivered by words, without any act of delivery, as if the writing sealed lies upon the table, and the feoffor or obligor says to the feoffee or obligee, 'take up said writing, it is sufficient for you,' or 'it will serve the turn,' it is a sufficient delivery. In *Goodright v. Strahan*, Cowp. 201, where a deed, in nature of a mortgage, was made by a husband and wife, of the wife's lands, which, by reason of the coverture, was admitted to be void as to the wife, yet facts, after the decease of the husband, amounting to an acknowledgment by the wife that the deed was hers, and that the party should enjoy according to the terms of it, were held to be equivalent to a redelivery. In *Goodrich v. Walker*, 1 John. Cases, 253, the Supreme Court of New York said: 'A formal delivery is not essential, if there be any act evincing the intent.' In the case before us, the obligor, after having signed and sealed the bond, holding it up in his hand, addressed the obligee, 'Here is your bond.' Words evincing and acknowledging a delivery as strongly as any which could be selected. As if he had said: 'This instrument is now complete. It has become a bond. It is now your property. What shall I do with it? It is now absolute. It is under your control. I have no longer any authority over it. Direct where it shall be placed, and by whom preserved, for your benefit.' The obligee said something not recollected nor proved, and the defendant added: 'I will take care of it for you.' 'I will take care of it,' not until some stipulation or condition is performed, not until certain circumstances occur which may induce me to give it legal efficiency; but 'for you' absolutely, unconditionally, as your property, in the character of your agent and fiduciary. It may be said that in the cases which I have cited, the deed, in some mode more or less direct, came into the hands of the person to whom it was made, and was produced by him. I do not apprehend that any substantial difference in principle results from this consideration. In the cases where the deed was left on the table, or cast on the table, there was no actual delivery to the grantee, or to any person for him. The essence of the whole consisted in the intent of the grantor or obligor to perfect the instrument, and to make it at once the absolute property of the grantee or obligee, and the acts and declarations are, in truth, the evidence of such intent."

Nor is it here necessary to resort to the theory of a trust to aid an incomplete gift. It may be conceded that if the gift was incomplete, it was ineffective. But we hold that the gift was complete, that the declared intent of the donor, the execution and acknowledgment of the deed of assignment, the delivery of a duplicate thereof to the insurance company, with notice to the donee that it had been done, are sufficient to constitute a complete and effective gift, and that the retention of the other duplicate and the policy by the donor (who had yet to pay premiums thereon) did not *per se* operate to establish a retention of dominion over the chose which was the subject-matter of the gift. The uncontroverted evidence of the notice by the donor to the donee, and the statement that he would hold the policy and the assignment for her, show conclusively that it was not the intent of the donor to retain dominion over the subject-matter of the gift.

It is conceded by counsel for appellee that the failure of Weaver to attach one of the duplicates of the deed of assignment to the policy, is not important, save as it may tend to show intent. But we regard the undisputed evidence of the declarations of Weaver to Snow and to appellant as overcoming any inference which might otherwise be drawn from this circumstance, and as establishing clearly an intent to relinquish dominion over the property and transfer the same to appellant.

The first assignment having been complete, the attempt to assign to appellee was ineffective.

The decree is reversed and the cause remanded, with directions to enter a decree in conformity with this decision.

Frank E. Pettit v. Newman G. Hall et al.

1. **SHORT CAUSE CALENDAR**—*Where the Last Day of the Notice Falls on Sunday.*—Where the last day of the notice to place a cause on the short cause calendar falls on Sunday the defendant will be entitled to no further time; the notice expires with the day.

Pettit v. Hall.

2. **MERITS**—*Insufficient Affidavit of.*—An affidavit of merits which states that the defendant's counsel "is of opinion that the defendant has a good and meritorious defense to this suit," is sufficient.

Assumpsit, upon written contract. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed March 14, 1899.

W. LAVERY, attorney for appellant, contended that the act known as the "short cause act," in designating the number of days for notice intended to require ten entire days and did not intend that a fraction of a day should be considered as a day, and this act is not governed by the sixth section of the statute relating to notices (Hurd's Ed. R. S., 1895, 1066, Chap. 100), but is controlled by its own language and the construction to be placed upon it from the intention of the legislature.

GURLEY & WOOD, attorneys for appellees.

PER CURIAM.

There was no affidavit setting forth any defense presented to the court by appellant, the defendant below, in support of the motion. This was necessary. *Little v. Allington*, 93 Ill. 253, 255.

The affidavit and notice were in due form and properly filed, and the cause was properly upon the short cause calendar.

The point that ten days' notice was not given, resting wholly upon the contention that the last of the ten days required expiring on Sunday, the defendant was entitled to all the Monday following, which was the day the cause was set for, and tried, is baseless. Rev. Stat., Sec. 6, Chap. 100, entitled "Notices."

An affidavit which has only to say for the merits of a defense, that defendant's counsel "is of opinion that the defendant has a good and meritorious defense to this suit," is insufficient.

Mary Tarpey v. Security Trust Co.

1. **INSURANCE—False Statements in Applications.**—A statement which is merely a copy of the application to another company previously made, and which was true when made, no one being deceived thereby, can not be treated as a false statement made to deceive the insurance company.

2. **SAME—Cancellation of Policies—Fraudulent Statement in Application.**—Where matter in an application for insurance can be imputed to the insured as statements fraudulently made by him, the policy is subject to cancellation at the election of the insurer.

3. **SAME—The Examining Physician the Agent of the Company.**—The physician who examines the applicant for life insurance is the agent of the company, and if he makes misstatements or induces the applicant to do so the company will be estopped to set them up as a defense.

Bill to Cancel Policies of Insurance.—Trial in the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Hearing and decree for complainants. Error by defendant. Heard in this court at the October term, 1898. Reversed and remanded with directions. Opinion filed March 16, 1899.

William C. Cummings, a resident of Chicago, made an application to the Security Trust Company, defendant in error, for two policies of insurance on his life, one for \$3,000, the other for \$2,000, payable in case of his death to his sister, Mary Tarpey, plaintiff in error. On the 15th day of October, 1895, said policies of insurance were issued and delivered to said William C. Cummings.

In November, 1895, Norman Kellogg, the general agent of the defendant in error in the city of Chicago, went to the home of said Cummings, stated to him that certain statements in his application were untrue, and tendered to him the premium paid by Cummings and demanded from him the policies. Cummings refused to accept the tender or return the policies. On the 14th day of November, 1895, the original bill was filed in the Superior Court, asking for a decree canceling the policies of insurance on the ground that they were obtained through fraud and misrepresentation in the application. While said case was pending Cum-

Tarpey v. Security Trust Co.

mings died, on the 22d day of February, 1896. His death being suggested, by leave of court, the bill was amended, and Mary Tarpey, plaintiff in error, substituted as defendant. Demurrer to the amended bill having been sustained, appeal was taken to this court, where the decree was reversed and the cause sent back to the Superior Court for trial.

The Security Trust Company is a life insurance company organized under the laws of the State of Pennsylvania, qualified under the laws of Illinois and doing business in Chicago. It was organized for and its business was to insure the class of lives which are sub-standard, persons with physical imperfections, deformed persons, those with loss of limb, eyesight or hearing, and those who are subject to attack of acute diseases, those with unfavorable family histories, and those who had been rejected as bad risks by other insurance companies. For insuring this class of persons it charged higher premiums than the old line companies charged for good risks.

In October, 1895, Kellogg was general manager of the western department of said company, with his office in Chicago, and at that time put an advertisement in a newspaper in Chicago telling the nature of the company's business and requesting insurance agents who might have rejected risks to bring them in to be insured by his company. Two agents, Harry Bate and Louis Neuer, who at that time were canvassing for the Iowa Life Insurance Company in Chicago, saw this notice in the paper, went to Kellogg's office and told him they had a customer who had made application to the Iowa Life, and that they were sure he would be rejected. Kellogg explained to them the nature of the risks his company was insuring, gave them pamphlets and printed matter explaining the company's business, and told them if the Iowa Life rejected their applicant, they should bring him in and the Security Trust Company would insure him, and made an arrangement with Bate and Neuer as to how they were to work for the company in bringing in rejected applications. They afterward brought in a number of the rejected risks.

On the 6th of October, 1895, Bate and Neuer had procured Cummings to make application for a \$5,000 policy in the Iowa Life Insurance Company. Cummings signed a written application to that company, in which he stated: "I have never made application to any life insurance organization which was declined, and I am in sound physical condition. I have never had disease of the lungs; have had pneumonia." Dr. John Ridlon examined him on this application and in his signed report to the Iowa Life Company, said Cummings had a prolonged expiratory murmur at the apex of the right lung, and reported the risk as "bad." This application, together with the doctor's report, was sent to the Iowa Life Company on October 7th, and in four days thereafter was rejected. Dr. Ridlon, on the day he made this examination, told the agent Bate that the Iowa Life Company would reject Cummings upon his report. Bate then went and got from Kellogg a blank application and medical examiner's report to the Security Trust Company. Kellogg then told him a copy of the Iowa Life examination would be sufficient, and on the 7th of October, before they had forwarded Cummings' application and medical examiner's report to the Iowa Life Company. Bate made a copy of the application and Dr. Ridlon made a copy of his report on these blanks of the Security Trust Company, and held them until they were notified of the rejection by the Iowa Life Company; Bate and Neuer then took these copies and went to Cummings' house on the 11th of October and told him, "We can not get you in the Iowa Life, but can get you in the Security Trust Company," and showed him the difference in the premiums—that the Security Trust Company charged thirteen per cent more, and read to Cummings from the Security Trust Company's pamphlet what risks it insured, read to him about the medical examination, gave him the pamphlet and handed him the copied application and medical examiner's report and told him it was a copy of those he had signed for the Iowa Life Company four days before, and asked him to sign them, and told him that they had copied them. Cummings signed

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them without reading them. Bate then took them and turned them in to Kellogg, the western manager. Bate had been told by Kellogg that the Security Trust Company would accept copies from the original application and medical examiner's report made to the rejecting company, and Bate told Cummings this when he asked him to sign the copies. Cummings signed without reading the copies, and Bate signed as agent of the Security Trust Company. This copy is dated October 6, 1895, the same date as that of the original application sent to the Iowa Life Company. Bate told Cummings they had copied the application and medical examiner's report from the original sent to the Iowa Life Company, and asked him to sign them as copies. He did so and did not read them. Bate left the pamphlet with Cummings. Bate then took them and gave them to Kellogg in his office at 162 La Salle street, and Kellogg read them and Bate told him that they were copies of the Iowa Life papers and asked Kellogg if he thought it would go through. Kellogg said he thought it would. Kellogg then sent them to the company's home office in Philadelphia.

In the copy of Dr. Ridlon's report thus sent to the home office of the Security Trust Company, and read by the chief medical officers and officers authorized to accept applications and issue policies, is the following:

"Are the respiratory organs, lungs, pleura, larynx, etc., free from any indication of disease? Answer. No. Is the respiration full, easy and regular? Answer. No. Number of respirations per minute is twenty-two and the rate of pulse (full minute) eighty-five; there is a prolonged expiratory murmur at the apex of the right lung."

There was also sent to the home office by Kellogg, along with the application and medical examiner's report, a certificate of medical inspection signed by Dr. Ridlon, and dated October 11, 1895, which informed the company that Cummings was the same person whom he had examined on October 6th for the Iowa Life Insurance Company, and that there had been no change in his condition. Upon these papers the company issued the policies in question and sent them to its western manager, Kellogg, who then knew Cum-

mings had been rejected by the Iowa Life Company; he gave them to Bate, its agent, who took them to Cummings and delivered them to him and collected of him the first quarterly premiums, giving him receipts therefor, and carried the money and gave it to Kellogg.

When the second premiums became due they were tendered the company. Cummings' health remained apparently unchanged until the last part of December, 1895, when he was attacked by a quick consumption, tuberculosis, and died on February 22, 1896. Proof of loss was duly made by Mary Tarpey, the beneficiary. The company refused to pay, and this suit resulted.

The trial court entered a decree dismissing the cross-bill for want of equity, and sustained the bill of complaint and decreed the policies void and ordered them canceled.

S. P. DOUTHART and J. J. KELLEY, attorneys for plaintiff in error.

Fraud is a false representation of material fact, made by the party who is charged with it, with a knowledge of its falsehood, or in reckless disregard whether it be true or false, with the intention that it shall be acted upon by the complaining party, and actually inducing him to act upon it to his damage.

In *Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, the Supreme Court of the United States lay down the rule in regard to a recovery in a case of this character as follows: "First, that the defendant has made a representation in regard to a material fact; secondly, that such representation is false; thirdly, that such representation was not believed by the defendant on reasonable grounds to be true; fourthly, that it was made with the intent that it should be acted upon; fifthly, that it was acted upon by the complainant to his damage; and sixthly, that in so acting on it the complainant was ignorant of the falsity, and reasonably believed it to be true." *Crocker v. Manley*, 164 Ill. 282. See also *Lawson on Contracts*, Sec. 226 and cases cited; *Schwabacker v. Riddle*, 99 Ill. 343; *Fetter on Equity*, 133; *Knight v. Gaultney*, 23 Ill. App. 376; *Mitchell v. Deeds*, 49

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Ill. 416; Roper v. Sangamon Lodge Trustees, 91 Ill. 518; Walker v. Hough, 59 Ill. 378; Tone v. Wilson, 81 Ill. 529.

An insurance company is estopped to deny its liability on a policy on the ground of false representations in the application, which are declared by the policy to be warranties, if at the time the agent knew or had notice of the facts concerning which the representations were made, and this is especially true if the agent by fraud or misrepresentations induces the applicant to make the false statements. Home Ins. Co. v. Mendenhall, 164 Ill. 458; Michigan Mutual Life Ins. Co. v. Leon, 37 N. E. Rep. 584; Ins. Co. v. Brodie (Ark.), 11 S. W. Rep. 1016; Dunbar v. Ins. Co. (Wis.), 40 N. W. Rep. 386; Protective Union v. Gardner (Kan.), 21 Pac. Rep. 233; Pickels v. Ins. Co. (Ind.), 21 N. E. Rep. 898.

An insurance company is estopped to deny the existence of facts known to its solicitor at the time the policy was written by him, though the policy contains a clause that "in any matter relating to this insurance, no person, unless authorized in writing, shall be deemed the agent of the company." Hart v. Niagara Fire Ins. Co., 38 Pac. 213; 9 Wash. 620.

Whoever solicits insurance on behalf of any life insurance company, not chartered in this State, or transmits an application or policy for such company, or advertises that he will receive or transmit the same, shall be held to be the agent of such company to all intents and purposes. Starr & Curtis' Statutes, page 1346, Sec. 115, under Life Insurance; Continental Ins. Co. v. Ruckman, 127 Ill. 375; Electric Life Ins. v. Fahrenkrug, 68 Ill. 463; Bodine v. Exchange Fire Ins. Co., 51 N. Y. 117; Schomer v. Hekla Fire Ins. Co., 50 Wis. 575; Knox v. Lycoming Fire Ins. Co., 50 Wis. 671; Alkan v. New Hampshire Ins. Co., 53 Wis. 136; Body v. Hartford Fire Ins. Co., 63 Wis. 157; Bennett v. Council Bluffs Ins. Co., 70 Iowa, 600; Pierce v. People, 106 Ill. 11; People v. People's Ins. Exchange, 126 Ill. 466; Continental Ins. Co. v. Chamberlain, 132 U. S. 304; Cook v. Federal Life Ins. Co., 74 Iowa, 746; 76 Iowa, 282.

A doctor who examines an applicant for a life insurance company is the agent of the company, and if he makes mis-

statements, or induces the assured to make false statements, the company is estopped to set them up as a defense. *Mutual Life Ins. of N. Y. v. Blodgett*, 27 S. W. Rep. 286; *Pudritzky v. Supreme Lodge Knights of Honor*, 43 N. W. Rep. (Mich.) 373; *McArthur v. Association*, 35 N. W. Rep. 430; *Dunbar v. Ins. Co.*, 40 N. W. Rep. 386; *Lemmink v. Ins. Co.*, 4 N. W. Rep. 469.

GEORGE B. SHATTUCK, attorney for defendant in error.

An insurance agent acts as an insurance broker; he is agent for the insured and not the insurer. *Hartford Ins. Co. v. Reynolds*, 36 Mich. 502.

The agent of the insurer whose authority is limited to receive and transmit applications and who prepares the application for the insured, is for that purpose the agent of the insured and must bear the responsibility for errors made by him in the application. *Wilson v. Conway Fire Ins. Co.*, 4 R. I. 141.

A limited agency in a case of life insurance will not be extended by operation of law to the act done by the agent in fraud of his principal and for the benefit of the insured, especially where it is within the power of the insured by the use of reasonable diligence to obviate the fraudulent intent. *Ellen Ryan v. World Mutual Life Ins. Co.*, 41 Conn. 168; *N. Y. Life Ins. Co. v. Fletcher*, 117 U. S. 519; *Vose v. Eagle Life & Health Ins. Co.*, 6 Cush. 42; *Ins. Co. v. Pyle*, 44 Ohio St. 19; *Jeffries v. Life Ins. Co.*, 22 Wall. 47; *Ætna Life Ins. Co. v. France*, 91 U. S. 510; *National Life Ins. Co. v. Minch*, 53 N. Y. 144; *Lowell v. Middlesex Mutual Life Ins. Co.*, 8 Cush. 127; *Bliss on Life Ins.*, 2d Ed., Sec. 38; *Pottsville Mutual Fire Ins. Co. v. Fromm*, 100 Pa. St. 347; *Maine Benefit Ass'n v. Parks*, 81 Me. 79.

MR. JUSTICE SEARS delivered the opinion of the court.

The only questions settled upon the former appeal in this cause were such as related to the sufficiency of the allegations of the bill of complaint and the jurisdiction of a court of equity in the case. *Security Trust Co. v. Tarpey*, 66 Ill. App. 589.

Tarpey v. Security Trust Co.

The cause is now presented after a hearing upon bill and cross-bill and answers and replications thereto, and the question now involved is as to the sufficiency of the evidence to sustain the finding of the trial court that the allegations of the original bill of complaint are true.

The bill of complaint alleges that Cummings made application to defendant in error for the policies of insurance in question, and in so doing answered certain questions and warranted that his answers were true; that the statements thus warranted to be true were, in effect, that he had not made any application for life insurance which had been rejected, and that his health was good; that the statements were false and fraudulently made to deceive defendant in error; that by such false and fraudulent representations the policies were obtained, and that on November 3, 1895, during the lifetime of Cummings, the defendant had tendered back premiums paid, and demanded a surrender of the policies; that in February, 1896, Cummings died; that plaintiff in error is the beneficiary named in the policies, and prays for a decree canceling the policies.

Among the other papers presented to Kellogg, the agent of defendant in error, in connection with the issuing of the policies, was what is termed "Supplementary application,—statements made to the medical examiner as part of the application to the Trust Company." In it is contained this clause:

"I declare that I am the person above described and understand the questions and answers in the above supplementary application and warrant said answers to be true. I agree that if, during my lifetime, any statements therein or in the original application are alleged to be untrue, and I fail when called upon to furnish to said company satisfactory evidence of their truth, the policy of insurance issued upon the faith of such statements and answers shall be *ipso facto* void, and I agree to surrender said policy upon tender or payment to me of the aggregate premiums paid.

Dated this 6 day of Oct., 1895.

WM. C. CUMNINGS,
Person Examined."

This agreement constituting an express warranty by the insured of the truth of the statements referred to, it would seem clear that if the statements were false, and can be imputed to the insured as statements fraudulently made by him, as alleged in the bill of complaint, then the policies were subject to cancellation at the election of defendant in error.

The statement that Cummings had not applied for other life insurance and been rejected, was false as related to the time of the application to defendant in error, but was true as related to the application to the Iowa company. When he applied to the Iowa company he had never been rejected. When he applied to the defendant in error, he had been rejected by the Iowa company, and defendant in error well knew this fact through its acknowledged general agent, Kellogg.

The application to defendant in error, in which this statement occurs, now alleged to have been false, was merely a copy of the application to the Iowa company; was made merely as a copy at suggestion of Kellogg, and was signed by Cummings as a copy only of that which was true when made. No one was deceived by this statement. Kellogg knew of the application to the Iowa company, and that the securing of the risk for defendant in error depended upon the rejection by the former company. Kellogg testified: "Bate and Neuer didn't tell me Cummings had been rejected at the time they brought the application in, but did afterward, before I had forwarded the policy, but after the application had been forwarded." It is apparent from other evidence that it was only in the event that the Iowa company rejected, that defendant in error was to attempt to secure the risk. It would be contrary to conscience and common sense to treat this as a false statement made to deceive this company. It is argued that in this class of cases the warranty of truth is held to be obligatory, whether the statement warranted be material or not. But we hold that this copy signed by Cummings was not in fact his statement of that which was false, but merely a copy of a statement

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which is conceded to have been true when made and was accepted as such copy by defendant in error.

The remaining question is, was the statement as to good health a false statement, and is it to be imputed to Cummings as a statement by which he deceived the defendant in error.

The statement in this behalf claimed to have been false, is differently framed in the application to the Iowa company, in the application to defendant in error, and in the supplementary application so-called. In the former, the applicant stated, "Have not now nor have ever had disease of lungs; I have had pneumonia." In the application to defendant he stated: "I am now in good health of body and mind. I have never been afflicted, during the past ten years, with any sickness, disease, ailment, injury or complaint." And in the supplementary application the following statements were contained: "I have never had habitual cough, raising or coughing blood; difficult or short breathing, habitual expectoration, pain in chest, or pulmonary system. I have not now, nor have ever had disease of lungs, or la grippe. I have had pneumonia. I have had no ailment since childhood. The pneumonia above mentioned occurred when applicant was eight years old."

The evidence as to the truth or falsity of these statements at the time when they were made is briefly as follows: Two physicians testify, each a witness called by the defendant in error. Dr. Ridlon, who made the original examination for the Iowa company, and who also made, after the rejection by the Iowa company, the certificate of examination for the defendant in error, testified that there was "a prolonged expiratory murmur at the top of the right lung" at the time of his original examination of Cummings; that he so notified Cummings; that he said in substance to Cummings, that if it were tuberculosis he should go away to some different climate, and if it was not tuberculosis, it was a matter of no importance, and that he advised Cummings to consult a specialist. This physician

further testified that there was but a small area of the lung affected, not enough to cause any inconvenience to the patient, and that Cummings might or might not know that he was sick at all. Dr. Johnstone, the other physician who testified, stated that at his examination on October 31, 1895, after the issuing of the policies, he found Cummings suffering from what he, Cummings, claimed was a cold recently contracted, but that he was then, in fact, in the opinion of witness, afflicted with tubercular consumption. He also stated that he was unable to see how the disease could have then been in progress for less than three months.

Neither physician made any examination of the sputum, and Dr. Ridlon testified that by no other means could it be accurately determined whether the patient was suffering from tuberculosis.

Bate, one of the agents who transacted the business of the insurance in question, testified that at the time of the application Cummings "appeared all right as to health." Eight witnesses called by plaintiff in error, testified that at the time in question Cummings appeared perfectly healthy and well, excepting that one of these witnesses testified that Cummings had a slight cold. Another witness, Mrs. Kane, testified that she was present when Dr. Ridlon examined Cummings, and that she heard Cummings ask the doctor "if he thought that there was anything the matter with his lungs," and that the doctor, after examination, said that "if there was anything the matter with his lungs, he could not detect it."

From a careful examination of all the evidence we think that the preponderance of it goes to establish that Cummings, except for information given him by the examining physician, supposed himself to be in a fair state of health, and that if there was then any tubercular condition of the lungs, it was latent and not known to Cummings himself. It is true, that his application to the Iowa company having been refused, he might therefrom have reasoned that there was something unfavorable in the physician's opinion of his history or his condition; but the evidence indi-

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cates that Dr. Ridlon, who was the physician upon whom the defendant relied for advice, gave a report of his conclusions to Cummings which was likely to lull him into a feeling of security as to his health, and did not make known to him all of his unfavorable opinion which he reported to the defendant in error.

That under the facts here, Dr. Ridlon was the agent of the defendant for the purposes of the examination of Cummings, we think is clearly established, and without any contradiction or conflict in the evidence. *Royal Neighbors v. Bowman*, 177 Ill. 27.

He reported the condition of Cummings accurately to defendant, so far as he could discern it, and this included all that Cummings could, from the evidence, be said to have known of the matter, and more. Nothing which Cummings said in any of his statements could have misled defendant in error, for it was fully informed.

Questions as to the agency of Dr. Ridlon, Bate and Neuer are not controlling, for the information as to the previous application and refusal and the information as to condition of health, all reached the appellee through Kellogg, as to whose agency no question is raised.

We therefore hold that the finding that these statements as to previous application and as to health were falsely made by Cummings, as alleged, and for the purpose of deceiving defendant in error, and that defendant was thereby deceived, is against the clear preponderance of the evidence.

The writer is of opinion that the decree should be reversed and the cause remanded for another trial; but in conformity with the views of a majority of the court, the decree is reversed and the cause is remanded, with directions to the Superior Court to dismiss the bill of complaint of defendant in error for want of equity, and to enter a decree in accordance with the prayer of the cross-bill of plaintiff in error. Reversed and remanded with directions.

**Adele Weber, for the use of People's Outfitting Co. v.
German Ins. Co. and Nathan J. Schilling et al.,
Interpleaders.**

1. **ABSTRACTS—Defective.**—Where the abstract is not sufficiently full to present the errors upon which the plaintiff in error or appellant relies, the court will not, as a general rule, go to the record for such information.

2. **BILL OF EXCEPTIONS—Sealing and Signing Ministerial.**—The sealing and signing of a bill of exceptions is merely a ministerial act.

3. **SAME—May be Signed and Sealed by the Judge after he Enters upon a New Term, as His Own Successor.**—The fact that the judge had entered upon a new term of office as his own successor at the time he signed and sealed the bill of exceptions, is immaterial.

4. **COLLATERAL ATTACK—Justice's Judgment—Grammatical objections.**—A justice's judgment rendered in a proceeding which was repeatedly continued by agreement, until it was finally heard, all parties appearing, and in which the justice had jurisdiction of the subject-matter and of the parties, can not be questioned collaterally for grammatical objections.

Garnishment.—Error to the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed January 24, 1899. Rehearing denied February 24, 1899.

MEYER S. EMRICH, attorney for plaintiff in error.

MOSES, ROSENTHAL & KENNEDY, attorneys for defendants in error.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

It does not affirmatively appear in the abstract of the record filed in this case what the judgment of the Circuit Court was, which the plaintiff in error seeks to have reviewed here. All that the abstract contains upon that subject is: "Finding of the court, entry of the judgment on the findings." From the assignments of error appearing in the abstract, we are led to the conclusion that the Circuit Court found "the issues for the interpleaders below and against the plaintiff below," and discharged "the garnishee below," and entered judgment upon such findings;

because it is stated that "the court erred" in so doing. This abstract is not sufficiently full to present all the errors upon which plaintiff in error seems to rely, and is defective as against her. *Shields v. Brown*, 64 Ill. App. 259, and cases there cited.

A motion is made in this court by defendant in error to strike the bill of exceptions from the record. At the time of the entry of judgment, plaintiff in error was allowed thirty days for a bill of exceptions. The time was subsequently extended, and the bill of exceptions was presented in open court, within the time of such extension, but was, it is said, settled and signed at a considerably later time and after the period of extension had expired. The term of the judge before whom the case was tried had meanwhile expired, but he had been duly re-elected and qualified as his own successor, and was in the regular performance of his judicial duties, holding a term of the Circuit Court. Objection was made to his settling and signing the bill of exceptions, upon the ground that the time within which this could be done had expired, and that the judge had lost jurisdiction by the expiration of his previous term of office. In the case of *Hake v. Strubel*, 121 Ill. 321, 329, the court says:

"We do not intend to be understood as holding that the mere ministerial act of signing and sealing a bill that has been presented to and settled and allowed by the judge in apt time, may not be lawfully performed out of term or after the expiration of the time fixed in the order, and the same be filed as of the time of its settlement and allowance; nor to hold that the rights of the exceptor presenting his true bill in apt time, can be affected by the neglect or refusal of the judge to perform the duty imposed upon him by the statute within the time limited; but to hold that where, as in this case, the bill is not presented to the judge, nor settled and allowed by him, nor filed until after the term has ended and the time fixed in the order has expired, the act of settling and allowing the bill is a nullity, and the matters contained in such bill do not become a part of the record, and where this appears affirmatively from the record, as in this case, advantage may be taken thereof by motion to strike the bill of exceptions from the record, as was done in the Appellate Court."

In this case it appears that the plaintiff in error presented his bill—and for aught that appears it was then a true bill—in apt time, and we think his rights can not be affected by anything that is shown in this record as done subsequently by the judge to whom it was presented, nor by the delay in signing.

The exceptor, so far as appears, had done “all in his power, without the further consent or assistance of his adversary, to reproduce to the court the evidence and transactions taken and occurring at the trial,” as was said in *The People v. McConnell*, 155 Ill. 192, 200. It is true that it is stated the bill of exceptions was “settled” the day when it was signed, “and not before.” But this is a statement of a mere conclusion. It does not appear that anything was done at that time, constituting a judicial settlement of the bill, nor that the trial judge performed any judicial act, such as “the determination and identification of what should be incorporated therein.” (*Hake v. Strubel*, *supra*, on p. 327.) The act of signing and sealing was ministerial.

If the bill as presented was, in fact, a true bill, as to the correctness of which there was no dispute, and the delay in obtaining the court’s signature was merely to enable the opposing counsel to examine it and determine that fact, there would be no occasion for the court to perform any judicial act in “settling” the bill. Nothing remained to be done except to sign and seal it, and this was, we think, properly done.

The fact that the judge had entered upon a new term of office as his own successor at the time he signed the bill of exceptions, is immaterial.

In *People v. McConnell* (155 Ill. on p. 202), it is said: “Every facility possessed by the trial judge, except that of personal recollection, is within the power of his successor in office presiding in his place and stead, and no reason can be perceived or exist why the judge to whom the application is made may not, in like manner, advise himself, and by like means arrive at a correct determination of what the bill of exceptions should contain.”

Weber v. German Ins. Co.

Where the judge succeeds himself, he continues to exercise any and every power lodged in the court.

The motion to strike out the bill of exceptions must be denied.

We are of opinion that the judgment in favor of Dernberg et al., rendered by the justice, was valid. The objection to it is grammatical—whether the word “when” in the transcript of the justice’s judgment relates to the date of the return of the writ by the constable, or to the return day of the summons. The transcript shows the case to have been repeatedly continued “by agreement” until it was finally heard, all parties appearing, including plaintiff in error. The justice appears to have had jurisdiction of the subject-matter and of the parties. *Pomeroy v. Rand*, 157 Ill. 176.

No appeal was taken from this judgment, which is now questioned collaterally. The parties must be held concluded by those proceedings.

The judgment of the Circuit Court is affirmed.

PER CURIAM.

In a petition for rehearing filed herein, it is suggested that the court inadvertently overlooked, first, the claim of plaintiff in error that its execution in the hands of the sheriff was a lien upon the fund in possession of the garnishee prior to the judgment in favor of Dernberg et al.; and second, the claim that by service of the writ of March 22d on the garnishee, the Circuit Court obtained jurisdiction prior to that of the justice, which it was contended was obtained March 27th. It is sufficient to say that these contentions were not overlooked, but were not, apparently, seriously urged in the brief of plaintiff in error, and it was not deemed necessary to discuss them at length.

It is not necessary now. We do not regard the execution in the sheriff’s hands as creating such lien, and the jurisdiction of the justice attached at the time of the service of the writ of March 17th.

The petition for rehearing is denied.

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John Spry Lumber Co. v. Michael Duggan.

1. FELLOW-SERVANTS—*Where the Doctrine Does Not Apply.*—Where the duties of persons do not bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution, the doctrine of fellow-servants does not apply.

2. SAME—*Duty Toward Persons on Premises by Invitation.*—Where a party, for the purpose of his own business, contracts with another to bring third persons upon his premises to perform service there, he thereby not only invites but contracts for the presence of such persons, and becomes obligated to exercise reasonable care for their safety while upon such premises.

8. VERDICT—*Impeachment of—Insufficient Showing.*—A verdict can not be impeached by producing a piece of paper found in the jury-room upon which was some unimportant writing by the foreman, and twelve different sums noted, the average amount of which was stated, and unsupported by anything which amounted to proof that the verdict had been reached by adding together the several amounts voted by the jurors, and then taking the average of such amounts.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. HENRY B. WILLIS, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed March 16, 1899.

Appellant, engaged in a lumber business, was unloading a boatload of lumber upon a dock, which it owned and controlled. Two sets, or gangs, of men were employed in unloading the cargo, one set passing the lumber out from the vessel, and the other set receiving the lumber and piling it upon the dock. There is no dispute but that the set of men engaged upon the dock in receiving and piling the lumber were the yard men, in the regular employ of appellant. There is some dispute as to whether the set of men engaged in the work on the boat of passing the lumber out to the yard men on the dock, were in the employ of appellant or one Hunt. There was evidence tending to show that Hunt was an independent contractor, who had taken, by contract with appellant, the job of furnishing men to do the unloading on the boat at a fixed sum. Appellant had upon its

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dock a water-closet which was for the use of the men engaged in work there. Appellee was one of the set of men on the boat who were passing the lumber out to appellant's yard men. He undertook to go from the boat to the water-closet, and in so doing followed the route from the boat to the closet which, from the evidence, would appear to have been the most direct of any safe route. While on his way, in passing by one of the piles of lumber placed by the yard men, the pile of lumber fell upon him and injured him. In this suit to recover damages for such injury, he was awarded a verdict for \$1,000, upon which judgment was rendered. From that judgment the appeal here is prosecuted.

AMERICUS B. MELVILLE and F. J. CANTY, attorneys for appellant.

JOHN S. HUMMER and D. G. RAMSAY, attorneys for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

The only question presented is as to the sufficiency of the evidence to sustain the verdict. No complaint is made of any ruling in matters of procedure. The instructions to the jury are not questioned, nor is it claimed that the verdict is excessive. It can not be contended that from the evidence appellee could be held to have been guilty of any negligence on his part. It is clear from the evidence that the course which he pursued in attempting to reach the closet was the only direct route which could be pursued by him and be safe. To have taken a different course, as suggested by some of the witnesses, would have brought him in the way of the men who were handling the lumber, and would have exposed him to apparent danger. Had he taken such course and been injured by the moving lumber, he would doubtless have been held to have been so far negligent in courting an apparent danger as to preclude any right to recover therefor.

There being no question as to the care exercised by appel-

lee for his own safety, we have to consider if negligence of appellant has been established as the proximate cause of the injury. There is no conflict in the evidence as to the cause of the injury, and it may be said to be undisputed that it resulted from carelessness on the part of the yard men in forming the pile of lumber in question.

The only defense interposed by appellant is, in effect, that it is not answerable to appellee for such carelessness, and that the same can not be imputed to it as negligence in relation to appellee. In support of the contention in this behalf, counsel for appellant argue:

1st. That appellee was an employe of appellant and was injured by the negligence of a fellow-servant.

2d. That appellee was an employe of appellant, and was injured through a risk which was an assumed hazard; and

3d. That if appellee was an employe of Hunt, and not of appellant, then he was, in relation to appellant, a mere licensee, and there existed no duty on the part of appellant toward him, by disregard of which a charge of negligence and a right of action could here arise.

The application of the doctrine of negligence of a fellow-servant here contended for, must depend upon a showing, in the first place, that appellant was the common master, or employer, of appellee and the yard men, through whose carelessness he was injured. But the evidence warranted the jury in finding that appellee was not an employe of appellant at all, but the employe of Hunt, an independent contractor. And the jury so found both by general and special verdict. Upon that finding there can be no application of the doctrine of a fellow-servant's negligence. Appellee testified that he was in the employ of Hunt. Four of the men who were engaged with appellee in the work on the boat, and whose employment was identical with that of appellee, testified that they were in the employ of Hunt. Hunt, who was called as a witness for appellant, testified: "My business is vessel unloading. * * * I had charge of unloading the boat. I had the job to look after and un-

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load the boat. I took the job in the spring to unload the boat, and get men for her every time she came and unloaded her. * * * The boat paid \$117.60; that was equally divided between twenty-eight men. I worked with the men on the boat. I counted among the twenty-eight. Mr. Spry engaged me, and sent me word when the boat would come in, and to get a gang of men to unload it, and I brought men there to unload the boat when it came."

Mr. Spry, called on behalf of appellant, testified:

"Martin Hunt would come up in the spring and say, 'Mr. Spry, can I unload your boat?' and I would say, 'Martin, what will you do?' and he would say, 'I want \$4.20. I want ten cents for the water boy, ten cents for each man, and \$4 for each man.'"

"Q. He wanted that for the season?" "A. Yes, they took them for the season."

It was undisputed that appellant paid Hunt for the entire work, and that appellee and the other workmen received their pay from Hunt.

The finding of the jury that appellee was in the employ of Hunt, an independent contractor, and not in the employ of appellant, disposes of the contention. But if it were conceded that the appellant was the common master or employer of both the yard men and appellee, it would not of necessity follow that the doctrine contended for applied. It is apparent from the evidence that the relation between the men working on the boat and the yard men working on the dock, was not such as to make their duties "bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution." *Rolling Mill v. Johnson*, 114 Ill. 57; *C. & A. R. R. v. Swan*, 70 Ill. App. 331, affirmed in 176 Ill. 424.

The two sets of men had no relationship to each other, except that the ones upon the dock received the lumber from the ones upon the boat. Appellee and the others upon the boat had nothing whatever to do with the piling of the lumber, nor did their work bring them in contact with that part of the yard men's work. Appellee's association with the yard men was that of a day only, and it ended

with the passing of the lumber over the rail of the vessel. We think that the jury would have been warranted in finding that they were not fellow-servants, had there been proof of a common employer.

Nor can the contention that the danger of the pile of lumber falling was an assumed hazard, be maintained. If appellee had been an employe of appellant, it could not be said from the evidence presented that he had assumed the risk. It appears conclusively that such a danger was not ordinarily incident to the business and that in fact it had never before occurred in the experience at that yard.

Neither could it be said that appellee, with knowledge of the danger, continued in his employment.

Finally, counsel for appellant contend that if appellee was an employe of Hunt, the appellant owed him no duty in the matter of keeping the surroundings upon the dock reasonably safe. In other words, it is argued that he was a mere licensee upon the premises of appellant. To this we can not assent. Appellee was not a mere licensee, enjoying a license subject to its attendant perils. He was not upon the premises merely for his own convenience and pleasure. On the contrary, there was a relationship between him and appellant arising from the contract between appellant and his employer, Hunt. The class of cases, many of which are cited, wherein one visiting premises for his own pleasure or convenience is held to accept all perils accompanying the license, do not apply here. When appellant, for the purposes of its own business, contracted with Hunt to bring appellee and others to unload its vessel, it thereby not only invited but contracted for the presence of appellee, and became obligated to exercise reasonable care for his safety while upon its premises. *Drennan v. Grady*, 167 Mass. 415; *Samuelson v. Cleveland*, 49 Mich. 164; *Powers v. Harlow*, 53 Mich. 507; *Evansville v. Griffin*, 100 Ind. 221; *Welch v. McAllister*, 15 Mo. App. 492; *Bennett v. Railroad Co.*, 102 U. S. 577; *Indermauer v. Dawes*, 1 L. R. C. P. 274; *Heaven v. Pender*, 11 L. R. Q. B. Div. 503.

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The jury could not have properly found from the evidence that appellee was merely a licensee.

Upon the motion for a new trial it was sought to impeach the verdict by showing that it had been reached by adding together the several amounts voted as damages by the several jurors, and then taking the average of such amounts. The showing in that regard was wholly insufficient to establish the fact. It consisted only in finding in the jury room a piece of paper upon which was some unimportant writing by the foreman, and upon which there were twelve different sums noted, the average of which was noted as 12762.

Whether the figures were used for the purpose claimed, was matter of suspicion only, unsupported by anything which amounted to proof; and it is clear that the process alleged to have been used did not result in arriving at the amount for which the verdict here was rendered, viz., \$1,000. The court properly disregarded the showing made in this behalf in overruling the motion for a new trial.

The judgment is affirmed.

**Rodman B. Ellison et al. v. Chicago Title & Trust Co.,
Assignee, et al.**

1. **PRESUMPTIONS**—*Admission of Evidence—Trials by the Court.*—In trials by the court where there is sufficient competent evidence to sustain the finding, the presumption is that all incompetent evidence improperly admitted was excluded from the consideration of the court in finding upon the issues.

Voluntary Assignments.—Proceeding in the County Court of Cook County; the Hon. JOHN H. BATTEN, Judge, presiding. Hearing and petition dismissed. Appeal by petitioners. Heard in this court at the October term, 1898. Affirmed. Opinion filed March 16, 1899.

The Straw & McCoy Company, an Illinois corporation, had a capital stock of \$20,000, divided into 200 shares of par

value of \$100 each. Mrs. Amelia E. Straw owned 197 shares; Mrs. McCoy, her daughter, owned one share; Mr. McCoy owned one share, and Mr. Straw owned one share.

The corporation was involved through indebtedness to one Mason. The dealings of the corporation with Mason have been considered by this court in *Mason v. Chicago Title & Trust Co.*, 77 Ill. App. 19.

Upon the 27th of September, 1897, the corporation made a voluntary assignment for the benefit of its creditors. Upon the same day two judgments were entered by confession in favor of Mrs. Straw, who was president and a director of the company. The notes and warrants of attorney were executed upon the day of the making of the assignment and the entering of the judgments. One of these judgments was for the amount of \$15,100, and the other for \$3,200.

The \$15,100 judgment is the subject of controversy in this cause.

Ellison & Sons, appellants, are creditors of the Straw & McCoy Company. Mr. Lane, their agent, reached Chicago two days after the entry of the judgment in question, and learned then, for the first time, that such judgment had been entered. He then entered into negotiations with Mrs. Straw to procure from her an assignment of the judgment to appellants, and it is now claimed by appellants that what amounted to an equitable assignment of the judgment was accomplished. It is also claimed by them that the judgment was in reality entered for the use and benefit of appellants, although in the name of Mrs. Straw. To enforce such claims appellants filed their petition in the County Court to obtain the benefit of the \$15,100 judgment and all the lien thereof, to apply upon their claim as creditors, which has been allowed by the County Court to the amount of \$15,255.

The appellees, Chicago Title & Trust Company, assignee, and Henry W. Mason, creditor, answered the petition, contending that Ellison & Sons did not own the judgment, which was entered in favor of Mrs. Straw, and that it was not entered for the use and benefit of Ellison & Sons; that

the petition did not describe any specific goods and chattels to which the alleged lien of the execution might have attached; that the execution had expired before the petitioners acquired any standing in the County Court; that no order was ever entered preserving the alleged lien of petitioners; that the plaintiff in the execution denied that she was acting as trustee for Ellison & Sons, and, by way of further defense, alleged that the judgment debtor, the Straw & McCoy Company, made a voluntary assignment for the benefit of its creditors under the statute, the same day that the judgment note was executed, upon which the judgment mentioned in the petition was confessed; that the corporation was insolvent at the time the judgment notes were executed, and that it determined at the same time to make a voluntary assignment, and that the entry of the judgment and the making of the voluntary assignment were one and the same transaction, and were designed for the purpose of hindering and delaying Mason and other creditors; that the judgment was fraudulent and void as to the general creditors of the Straw & McCoy Company, and was without any *bona fide* consideration, and was for the purpose of creating an unlawful and illegal preference in favor of one of the directors of the insolvent corporation.

Amelia E. Straw, the judgment plaintiff, appeared and answered the petition, denying that the judgment was entered for the use or benefit of Ellison & Sons, and denying that Ellison had any right to the same, and claimed that she was entitled to the benefit of the judgment.

The County Court found that Amelia E. Straw and other officers and directors of the Straw & McCoy Company had guaranteed the Ellison indebtedness and had given certain insurance policies and other property as collateral security to said indebtedness; that the confession of judgment described in the petition, and the delivery of the execution to the sheriff was done by the corporation in contemplation of and after the insolvent had decided, determined and planned the making of a voluntary assignment for the benefit of its creditors, and that the confession and judgment

and the delivery of the execution, and delivery, filing and recording of the deed of assignment were one and the same act, and that the confession of judgment was a fraudulent, illegal and void preference under the statute; that Amelia E. Straw had no valid claim against the Straw & McCoy Company, and that the execution was never a lien on the goods and chattels of the Straw & McCoy Company; that the judgment was confessed for the benefit of Amelia E. Straw, and was therefore void as a preference to one of the directors of said insolvent over its other creditors at a time when said corporation was in fact insolvent.

Upon hearing, the petition of appellants was dismissed. This appeal is prosecuted from the order dismissing the petition.

C. M. MACLAREN and W. H. UTT, attorneys for appellants.

The execution became a lien upon the stock of goods and fixtures at 4:17 P. M., September 27, 1897, and before the assignment was executed or filed. Rev. Stat., Ch. 77, Sec. 9; Kiehn v. Bestor, 30 Ill. App. 458; Blatchford v. Boyden, 122 Ill. 657; Leach v. Pine, 41 Ill. 65; Hanchett v. Ives, 133 Ill. 332.

The lien continued though levy was not made within the short time between placing the execution in the sheriff's hands and taking possession of the assignee and then never was made. Kiehn v. Bestor, 30 Ill. App. 458; Marder, Luse & Co. v. Filkins, 51 Ill. App. 587; Field v. Ridgley, 116 Ill. 424; Yates v. Dodge, 123 Ill. 50; Hanford v. Prouty, 133 Ill. 339.

The execution remained a lien upon the property for ninety days after the date thereof, though levy was not made by reason of the property coming into the hands of the assignee. Cases cited above; Rev. Stat., Ch. 77, Sec. 8; Launtz v. Gross, 16 Ill. App. 329; Freeman on Executions, 202.

The lien continued after the return day of the levy, though the claim was not proven until after the return day had passed. Kiehn v. Bestor, 30 Ill. App. 458; Corbin v. Pearce, 81 Ill. 461.

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It attached to the proceeds of sale in the hands of the assignee. *Field v. Ridgley*, 116 Ill. 424; *Hoover & Co. v. Burdette*, 153 Ill. 672; *Richelieu Hotel Co. v. Miller*, 50 Ill. App. 390; *In re Knapp (Iowa)*, 70 N. W. Rep. 626.

The execution is not returned until actual deposit in the office of the clerk of the court from which it issued. The writ in this case was returned to the office on the 28th of December. *Nelson v. Cook*, 19 Ill. 440.

It was returnable in ninety days. To make the computation, exclude the day of date, and it would fall returnable on Sunday, December 26th. Under the statute the time would extend to the 27th at midnight. R. S. Ill.; *Alderson on Judiciary Writs and Process*, Sec. 99; *Nelson v. Cook*, 19 Ill. 440.

The assignee took the property subject to all liens. *Kiehn v. Bestor*, 30 Ill. App. 458; *Marder, Luse & Co. v. Filkins*, 51 Ill. App. 587; *Field v. Ridgley*, 116 Ill. 424; *Schwartz v. Messinger*, 167 Ill. 474; *Davis v. Chicago Dock Co.*, 129 Ill. 180.

An insolvent corporation has the right, in the absence of a fraudulent intent, to make preferences among creditors, and this it may do voluntarily and without the creditor's knowledge or insistence, and to the extent of preferring relatives of the directors or of securing creditors who have the guarantee of directors and officers. *Blair v. Ill. Steel Co.*, 159 Ill. 350; *Union Nat. Bank v. State Nat. Bank*, 168 Ill. 256; *Schwartz v. Messinger*, 167 Ill. 474; *Henderson v. Ind. Trust Co.*, 143 Ind. 561.

The trustee or person to whom the instrument creating the preference is made may be an officer or an employe of the corporation. *Blair v. Ill. Steel Co.*, 159 Ill. 350.

A creditor who holds collaterals may be preferred to the full amount of his claim unpaid at the time of making the preference regardless of the value of the collateral. *Levy v. Chicago Nat. Bank*, 158 Ill. 88; *Eugene Bates, Assignee*, 118 Ill. 524; *Com. Nat. Bank v. First Nat. Bank*, 53 Ill. App. 358.

All of the stockholders and all of the stock being repre-

sented at the meeting on the morning of September 27th, when the resolution was passed to confess the judgment and thus prefer creditors, in legal effect, places preference in exactly the same position as if made by individuals. The fiduciary obligations of directors and officers and the rules applicable thereto did not exist. It was in the power of that meeting to prefer a claim in which the president of the company was directly interested. *Sanford Tool Co. v. Howe, Brown & Co.*, 157 U. S. 312; *Henderson v. Ind. Trust Co.*, 143 Ind. 561.

It is not the proximity as to time the preference was given and the assignment made that renders the preference void, but it is the intent of the parties. If, when the preference was made there was no intent to make an assignment, the preference is good. *Union Nat'l Bank v. State Nat'l Bank*, 168 Ill. 264; *Blair v. Ill. Steel Co.*, 159 Ill. 350; *Kiehn v. Bestor*, 30 Ill. App. 458; *Gage & Co. v. Parry, Assignee*, 69 Ia. 605; *Caldwell's Bank v. Crittenden*, 66 Ia. 237; *Clement, B. & Co. v. Johnson & Maring*, 85 Ia. 566; *Roberts, Butter & Co. v. Press*, 97 Ia. 477; *Farwell v. Maxwell*, 34 Fed. Rep. 727; *In re Assignment of Mahon*, 91 Ia. 122.

The burden is upon the assignee and Mason to prove fraud or intent to make an assignment, and if fraud was attempted the preferred creditors must participate therein. This must be proven by clear and convincing evidence. *Hanford v. Prouty*, 133 Ill. 339; *Union Nat'l Bank v. State Nat'l Bank*, 168 Ill. 264.

WALKER & DAVIS, attorneys for appellees.

MR. JUSTICE SEARS delivered the opinion of the court.

The contention of appellants is that Mrs. Straw, a director and the president of the insolvent corporation, took the note and warrant of attorney in her own name as a trustee for appellants, and for the sole purpose of securing the appellants' claim. The County Court found as fact that Mrs. Straw did not so do, but took the security for her own sole use.

It appearing from the resolution of the board of directors and from the note and warrant of attorney that the same were given by the corporation to secure a debt to Mrs. Straw, it is at least doubtful if the declarations of individual directors as to the intent of the corporate act, such declarations having been made after the action of the corporation, could be taken as evidence of an intent different from that expressed by the act itself and by resolution of the board. But in any event, upon a careful examination of all the evidence, we are satisfied that the finding of the County Court as to the fact that the security was given by the corporation to Mrs. Straw for her own sole use and benefit, is fully sustained by a decided preponderance of the evidence.

Mrs. McCoy, daughter of Mrs. Straw, and director and treasurer of the corporation, testified: "I was present at meeting of directors at Lexington Hotel on morning of September 27th. My father (vice-president and secretary) made a motion in reference to the \$15,100 note, and it was agreed that a judgment note should be given. I did not inquire into the consideration for the \$15,100 note. My father said that he owed Mrs. Straw \$15,000, and we voted to give it to her." The testimony of Mr. McCoy was to like effect. Mrs. Straw, in her answer to the petition of appellants, denied that the execution of the judgment note was for the benefit of the petitioners, appellants.

That Mrs. Straw had no valid claim under the note and the judgment entered thereon, that she was president and director of the corporation when the notes were given to her, and that she was a debtor to the corporation, and, in effect, that the note was fraudulent and void, has been adjudicated by the order of the County Court, which is final, and has not been appealed from by Mrs. Straw.

Nor is the evidence sufficient to sustain the theory of an assignment of the note and judgment to appellants, if such an assignment could have been of any avail.

There is evidence tending to show that an attempt was made to procure Mrs. Straw to assign the judgment to appellants; but the evidence taken together fully warranted a

finding that no such assignment, either legal or equitable, was ever in fact accomplished.

Complaint is made as to rulings of the court in admission of evidence which was incompetent.

The trial was by the court, without a jury. Without passing upon the competency of the evidence questioned, it is enough to say that the presumption is that any such evidence as was incompetent and improperly admitted was excluded from the consideration of the court in finding upon the issues, there being sufficient competent evidence to sustain the finding. *The M. D. T. Co. v. Joesting*, 89 Ill. 152; *Dorsey v. Williams*, 48 Ill. App. 386.

As the foregoing consideration disposes of the case, it is not necessary to discuss other questions raised, the determination of which would not affect the result.

The judgment is affirmed.

Maurice Weil v. American Metal Company.

1. **COMMERCIAL TRANSACTIONS**—*Common Sense and Common Usage* *fn.*—Common sense and usage in commercial transactions, are as applicable in courts of law as among business men.

2. **CONTRACTS**—*What is Not an Abrogation.*—Where one party to a contract informs the other that unless two invoices are promptly settled, he should consider all business between them at an end for once and forever, the only fair and reasonable interpretation is that, in the event mentioned, he would not make any other or new contract with him. It is not to be interpreted as an abrogation of a pending and partly performed contract.

Assumpsit, for goods sold and delivered. Trial in the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed March 14, 1899.

M. J. ISAACS and PAM, DONNELLY & GLENNON, attorneys for appellant, contended that the contract in question was not an entire one, but was made up of distinct and severable

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contracts; and even if the appellant were guilty of a breach of a portion thereof in failing and refusing in any manner to perform as to one particular shipment or delivery, such breach did not relieve the appellee from in every respect otherwise complying with the other portions of the contract; so that even if it is assumed for the purpose of argument, that the evidence sustains appellee's claim that the two cars of lead were properly tendered in July, and the appellant refused to receive or pay for them, yet that act of appellant in no way relieved appellee in regard to the spelter to be delivered thereafter, to make full and proper tender thereof, at Chicago or East St. Louis. Where a contract is not an entire, but a severable one, as in the case at bar, a breach of any one part does not relieve the complaining party from performing the remainder; we submit the following authorities: *Simpson v. Crippin*, L. R., 8 Q. B. 14; *Freeth v. Burr*, L. R., 9 Com. Pleas, 208; *Johnassan v. Young*, 4 Best and Smith, 296; *Roper v. Johnson*, L. R., 8 Com. Pleas, 167; *Brandt v. Lawrence*, 1 Q. B. Div. 344; *Reuter v. Sala & Co.*, 4 Common Pleas, 256; *Mersey Steel and Iron Co. v. Naylor*, Benzon L. R., 9 Q. B. Div. 648; 9 House of Lords App. Cases, 434; *Morgan v. McKee*, 77 Penn. St. 228; *Blackburn v. Reilly*, 47 N. J. Law, 290; *Trotter v. Heckscher*, 40 N. J. Eq. 612; *Winchester v. Newton*, 2 Allen, 492; *Tucker v. Billing*, 3 Utah, 82; S. C., 5 Pac. Rep. 554; *Myer v. Wheeler et al.*, 65 Ia. 395; S. C., 21 N. W. Rep. 692; *Hanson v. Consumers Steam Heating Co. (Iowa)*, 34 N. W. Rep. 495; *Cahen v. Platt*, 69 N. Y. 348; *Graver v. Scott*, 80 Penn. St. 88; *Quigley v. De Haas*, 82 Penn. St. 267; *Scott v. Kittanning Coal Co.*, 89 Penn. St. 231.

Where custom or trade meaning is not disclosed, and no explanation is made, either in the pleadings or in the evidence, and they not being common terms, the law will not assume to give significance to them for the purpose of establishing a condition of a contract and creating a breach thereof, without some evidence or explanation as to their meaning, and without submitting them to the consideration

of the jury. *Darling v. Dodge*, 36 Me. 370; *McNichol v. Pac. Ex. Co.*, 12 Mo. App. 401-407; *Brown v. McGran*, 14 Pet. (U. S.) 479 (493); *Lucas v. Groning*, 7 Tant. 164; *Law v. Gross*, 1 Black (U. S.), 533; *Burr v. Williams*, 20 Ark. 172-188; *Ward v. Lattimer*, 2 Tex. 245, 248.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for appellee.

All contracts made in the ordinary course of business without particular stipulations, expressed or implied, are presumed to be made in reference to any existing usage or custom relating to such trade, and persons dealing therein will be held as intending that the business should be conducted according to such general usages and customs. *Chisholm v. Beaman Machine Co.*, 160 Ill. 101.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The appellee recovered judgment for \$1,136, upon the verdict of a jury, in a suit brought by it against appellant for damages because of the alleged failure of appellant to accept certain carloads of lead and spelter, under a contract between the parties, and this appeal has followed.

The contract rests entirely in letters and telegrams between the parties, from which we deduce, as the true interpretation and construction thereof, that appellee sold to appellant eight carloads of pig lead and eight carloads of spelter, at specified prices, free on board cars either at St. Louis or Chicago, at appellant's option, deliverable in specific numbers of carloads within specified months, in the future, upon shipping directions to be given by appellant; each shipment to be accompanied or followed by a sight draft for the amount thereof at the agreed price with bill of lading attached, which appellant would pay upon presentation.

The appellant does not concede such to be, in all respects, the contract, but considering all the letters and telegrams together, and the construction the parties themselves put upon their contract in their actings and dealings under it, as to such parts of it as were performed without contro-

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versy, such must be held to be the substantial legal effect of their agreement.

The controversy is over two carloads of pig lead, amounting to \$2,360.56, shipped to appellant at Chicago, at appellant's request, which appellant refused to accept or pay for, and which were sold out by appellee at a loss from the contract price, and three carloads of spelter, for which appellant failed to give shipping directions, and in legal effect refused to accept a delivery of, concerning which appellee claimed a difference between the contract price and the market price. All other of the lead and spelter had been previously shipped and paid for.

We fail to discover anything in the argument in behalf of appellant which attacks the correctness of the verdict, in amount, except in the item of interest, if appellee was entitled to a verdict for any sum whatever.

But appellant contends that sufficient proof was not made of the cause of action declared upon to justify any verdict. Assuming that appellant is in a position to raise that point we think it is not well taken.

As to the two carloads of lead, the price per 100 pounds was fixed by the contract, and the weight was ascertained by the certificates of sworn weighers attached to the invoice, and shown to the appellant. As to the three carloads of spelter, the price per 100 pounds was also fixed by the contract, and the minimum weight of a carload of spelter was shown.

The market value of both metals at the time in question was given in evidence by stipulation.

The result in each case was a mere matter of calculation.

In *Coal Co. v. Block & H. Smelting Co.*, 53 Ill. App. 565, where the contract price of slack coal was \$2 per carload, but the price per ton was not fixed, evidence of the average capacity of a coal car was permitted in order to arrive at the price per ton, by computation. Here the price per 100 pounds of the spelter was fixed by the contract, and by the same reasoning, the minimum weight of a carload was proper, to arrive at the value of a carload by computation. And the minimum weight would necessarily be somewhat

less than the average weight, so that surely the appellant was not wronged in that respect. •

Common sense and common usage in commercial transactions, are as applicable in courts of law as among business men.

It is insisted by appellant that no legal breach of the contract was shown, and it is said there was never any actual refusal by appellant to receive either the lead or the spelter. The shipment of the lead, in response to the request of appellant, and notification thereof by letters from appellee to appellant, and the presentation by appellee to appellant of a sight draft for the amount, with invoice and bill of lading attached, together with the circumstance that appellant never made any objection to the payment of the draft upon the ground that tender of the lead in Chicago was not made, furnished ample evidence for the court below to find that all that was required of appellee in that respect had been done, and we discover no sufficient reason for overturning the conclusion in that respect.

It is not claimed by appellee that there was ever any shipment of the spelter, but it appearing from appellant's letters that he would not give shipping directions concerning it, or accept it if shipped, unless certain extraneous demands of his were complied with, it was not incumbent upon appellee to do the unnecessary thing of shipping; or otherwise making a tender.

The evidence was enough to warrant the finding by the trial court that there was a breach by appellant of his contract concerning the spelter, as well as the lead, and we ought not to disturb it. All the proof was made, in every respect, that the nature of the transaction required.

Considerable stress is laid by appellant upon his contention that the contract was terminated by the letter of June 23, 1893, from appellee to him, and his answer thereto, and to intervening letters from appellee, under date of July 1, 1893, and hence, that he was under no obligations to accept either the lead or spelter that is in controversy. This contention has no basis except upon the concluding sentence in appellee's letter of June 23d, that "We now

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beg to give you notice that unless these two invoices are promptly settled by you, we shall consider all business between us at an end for once and forever.”

The only fair and reasonable interpretation of that expression is that, in the event mentioned, appellant would not make any other or new contracts with appellee. It would be a most forced construction to give it any other interpretation. Besides, subsequent letters from appellee, and appellant's answer of July 1st, show it was not meant or understood by either party, that the pending and partly performed contract, for which appellant was already indebted in part, should be abrogated.

We have examined all the claimed errors concerning the admission and rejection of evidence, by which appellant urges that he was injured, but we think there was no material error in such respects.

The point that interest was not allowable has merit, as an abstract proposition, but we can not find from the record that interest was allowed. The court instructed the jury to find generally for the plaintiff (appellee), but not for any specific amount. The amount was left to the jury and there is nothing to show that they added interest to the damages.

The appellant neglected to file a brief of his points, as the rule of this court requires, and if we have failed to pick out, from his argument, every point worthy of discussion, it is his fault.

The judgment of the Circuit Court, for anything we have been able to discover, is right, and it will be affirmed.

Martin Mogk, Jr., by his Next Friend, v. The Chicago City Ry. Co.

1. MASTER AND SERVANT—*Liability for Trespasses of the Servant.*—A master is liable for a trespass committed by his servant, *bona fide* as such, and in the line of his employment.

2. SAME—*Trespasses for Which the Master is Not Liable.*—A trespass

committed by a servant merely to prevent an annoyance to himself is not an act for which the master is liable.

3. *RES ADJUDICATA—Appellate Court Decisions.*—Where the Appellate Court has once passed upon the questions involved in a case, its decision as to such questions remains the law of the case in all its subsequent stages, and is binding not only upon the trial court in subsequent trials but also upon the Appellate Court in subsequent appeals.

4. *RES GESTÆ—Declaration of Agents.*—The declaration of an agent or servant made in the immediate connection of the doing of some act in the line of his duty, and which relates to what he is doing so as to become part of the act or *res gestæ* itself, is always competent evidence to be used against the principal when the act done becomes the subject of judicial inquiry.

5. *SAME—What Declarations Are Not.*—The exclamation “get off, keep off,” by a driver of a street car drawn by horses, and his acts in striking at boys running along the side of the car for fun, but not trying to get upon it, are not enough to prove that the driver was acting in the line of his employment.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Verdict and judgment for defendant by direction of the court; appeal by plaintiff. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed March 14, 1899.

C. M. HARDY, attorney for appellant.

The declarations of an agent or servant of the principal, made in the discharge and line of his duty and in the immediate connection of the doing of some act in the line of his duty, and which relate to what he is doing, so as to become part of the act or *res gestæ* itself, is always competent evidence to be used against the principal when the act done becomes the subject of judicial inquiry. This is allowed because the act and the declarations made in connection with it form one indivisible transaction. *C. & St. L. R. R. Co. v. Ashling*, 34 Ill. App. 108.

W. J. HYNES and H. H. MARTIN, attorneys for appellee.

The rule of law is well settled that, when an Appellate Court has once passed on questions in a case, its decision as to those questions remains the law of the case, in all its subsequent stages, and *res adjudicata*, binding, not only on the trial court in any subsequent trial, but also on the

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Appellate Court itself on any subsequent appeal in the case. *Oldershaw v. Knoles*, 6 Ill. App. 325; *Chi. Drop F. F. Co. v. Van Dam*, 50 Ill. App. 470; *C., M. & St. P. Ry. Co. v. Hoyt*, 44 Ill. App. 48; *Village of Desplaines v. Poyer*, 22 Ill. App. 574; *Cent. Warehouse Co. v. Sargent*, 40 Ill. App. 438; *C., M. & St. P. Ry. Co. v. Snyder*, 27 Ill. App. 476; *Allemania Ins. Co. v. Peck*, 33 Ill. App. 548; *Flower v. Brumbach*, 30 Ill. App. 294; *Ogle v. Turpin*, 8 Ill. App. 453; *Union M. Life Ins. Co. v. Kirchoff*, 51 Ill. App. 67.

The Supreme Court has also repeatedly applied this rule of law. *Smyth v. Neff*, 123 Ill. 310; *Johnson v. Von Kettler*, 84 Ill. 315; *West v. Douglas*, 145 Ill. 164; *Hook v. Richeson*, 115 Ill. 431; *Moshier v. Norton*, 100 Ill. 63.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is an action to recover for personal injuries. The Circuit Court instructed the jury to find the defendant not guilty, and the plaintiff appeals.

The facts are substantially as stated in the opinion filed when the case was formerly before this court, which is reported in 44 Ill. App., page 17, except that it is now urged, as stated by appellant's counsel :

"Upon the last trial a new and most important witness was produced, who heard the language of the driver in immediate connection with the doing of the act by him which caused the boy's injuries, and which related to what he was doing so as to become a part of the act or *res gestæ* itself. * * * Upon the first trial, appellant was absolutely without proof of the words used by the driver which accompanied his act of striking the boy with the lines. Herein, mainly, but not entirely, lies the difference between the evidence upon the first and second trials. Herein, the court below erred in saying that 'the Appellate Court decided, on substantially the same facts we have in this case now, that the plaintiff could not recover,' and in instructing the jury to find the railway company not guilty, in accordance with his expressed opinion. The new witness referred to * * * testified that at the time of the accident, she was going west along the north side of Thirty-first street, near Wallace street, after school hours,

and that she met school children on the street; that she heard the appellant halloo, which attracted her attention, especially to him, and saw him running along beside the car, saw him raise his hand and heard him speak; that she saw the driver turn and strike him with the lines, and say: 'Get off—keep off, you brute' or 'brat.' She further said: 'My best recollection is the word was brat; he would hardly call a little child a brute. I saw the driver strike at the child with the lines. I saw the lines, and they seemed to hit the child's arm or hand, and he dropped and fell; the lines wrapped around his waist and arm and threw him; I saw him fall and saw the car pass over his limb.' On cross-examination she said she first saw the boy just before he got to the car, just about to it, then running at a pretty good gait by the side of it; that he was about one-third of the way from the rear of the car to the front; that he ran the other two-thirds of the length of the car before the accident, and caught up with the front platform, while the horses were trotting along about as usual."

We have thus stated in the language of counsel for appellant, who, upon the former trial, represented the other side, the evidence upon which he relies. He claims that the evidence of this new witness "and other facts and circumstances proven in the case (which appellant fears this honorable court overlooked in considering the case at first), supply what this court found was lacking in the former record, that is, two out of the three conditions necessary to render the master liable for the act of his servant."

These conditions are stated in the former opinion of this court in language quoted from *Arasmith v. Temple*, 11 Ill. App. 39, that "a master is liable for trespass committed by his servant, *bona fide* as such, and in the line of his employment; but all these three conditions are necessary to make him liable;" and it was held that the only one of these conditions presented by the former record was that the driver was the servant of the appellant.

Does this additional testimony supply the other two conditions, namely, that the trespass was committed by the servant in good faith in his capacity as servant, and in the line of his employment?

It is urged that the language used by the driver, accord-

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ing to this new witness, at the time he struck the boy with the lines, indicates that he was acting within the line and scope of his employment to prevent the boy from getting on the car as a trespasser.

There is no evidence tending to show that it was in the line of the driver's employment to keep boys from getting on the car, even assuming—and it is pure assumption—that the language used indicates such intention. Certainly it can not be presumed that it was within the line of his employment to use the driving lines as it is claimed that he did. "Appellant could not," says his counsel, "have proven affirmatively that what the driver said and did were *bona fide*, and were said and done within the line of his employment; these conditions can only be reasonably inferred from all the evidence and all the facts and circumstances in evidence;" and it is contended that this was a question which should have gone to the jury. The argument is that because the declaration of an agent or servant (as stated in *C. & St. L. R. R. Co. v. Ashling*, 34 Ill. App. 99) "made in the discharge and line of his duty and in the immediate connection of the doing of some act in the line of his duty, and which relate to what he is doing so as to become part of the act or *res gestæ* itself, is always competent evidence to be used against the principal when the act done becomes the subject of judicial inquiry," therefore the evidence of these declarations should have been submitted to the jury. But this presupposes or assumes that the driver's exclamation was made in the discharge and line of his duty, and in immediate connection with "some act in the line of his duty." Unless so made, they were not admissible.

In the discharge and line of his duty, the driver was driving the horses attached to the car. This court found no evidence in the former record which justified or tended to support the conclusion that the driver was in the discharge and line of his duty in striking at the boy, who was not, according to his own statement, trying to get on the car at all, and had no such intention, but was running along beside the driver for fun, and making some gesture at him.

Unless this new evidence tended to prove that the driver was in the line and discharge of his duty when he struck at the boy, no error was committed in refusing to submit it to the jury. It is urged that the evidence of what the driver said when he struck at the boy, shows why he struck and the motive which prompted the action. Granting this, the words, "Get off—keep off," addressed to one who was not on nor intending to get on his car, but who was running along gesturing at him, can scarcely be competent evidence to prove that the driver was merely doing his duty in keeping off a trespasser; they, may, perhaps, indicate impatience at the conduct of one who was annoying him, but a trespass committed by a servant merely to prevent an annoyance to himself, is not an act for which the master is liable. It is doubtless true that it may not always be possible to prove affirmatively that the act of the servant is in the line of his employment, and that it can only be proved by evidence of facts and circumstances leading to that conclusion; but the facts and circumstances must be such as to justify the conclusion when fairly and fully considered in all their relations.

It is urged that the driver supposed the boy to be trying to get on the car, and that this was a legitimate inference from the boy's action and the driver's language. But the evidence does not justify such a conclusion, for the reasons above stated, and it would certainly be erroneous to submit a question to the jury and allow them to guess as to what was passing in the driver's mind.

The evidence indicates that the car driver, in the employ of the appellee, willfully—it may be sportively or maliciously—struck with his driving lines at the appellant, who was not a passenger nor intending to be one, and to whom appellee owed no obligation. This could not have been in the line of his employment.

The new evidence does not, in our judgment, strengthen the appellant's case. No error was committed in directing the jury to find the defendant not guilty, and the judgment of the Circuit Court is affirmed.

In Matter of Assignment of Nathan Landfield.

80	417
182	264

80	417
112	1579

**In the Matter of the Assignment of Nathan Landfield,
on His Petition for Exemptions.**

1. **PARTNERSHIP—Voluntary Conveyances to a Partner of an Insolvent Firm.**—A voluntary conveyance of all the firm property to one of the partners of an insolvent firm, is invalid as against existing firm creditors; and an assignment made by the partner to whom the conveyance is so made, will be treated in equity as made for the benefit of the partnership, in preference to individual creditors.

2. **SAME—Transfer of Firm Assets—Good Faith Essential.**—Good faith in the transaction is always essential to a transfer by a partnership of its assets to an individual member of the firm.

3. **SAME—Settlement on Equitable Principles.**—Courts of insolvency wind up the affairs of a partnership on equitable principles.

4. **SAME—Voluntary Assignment and Bill of Sale Held to be the Same Transaction.**—A bill of sale by one of two members of an insolvent partnership to the other, and a voluntary assignment by the other four hours thereafter, are parts of one and the same transaction, and are to be treated as made by the firm for the benefit of its creditors.

5. **SAME—Firm Assets a Trust Fund.**—Firm assets are a trust fund for the payment of its creditors. The partners individually can have no absolute property in the fund or in any specific part of it, until the firm creditors are fully satisfied.

6. **EXEMPTIONS—When Not to be Allowed in Voluntary Assignments.**—A sale of partnership assets made by one of two partners to the other, followed by a voluntary assignment immediately after by the other partner, if made by the former for the purpose of obtaining his exemptions at the expense of firm creditors, to which he would not otherwise be entitled, is to that extent a fraud upon such creditors.

Voluntary Assignments.—Petition for exemptions. Trial in the County Court of Cook County: the Hon. W. S. WHEATLEY, Judge, presiding. Hearing and judgment for respondents; appeal by petitioners. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed March 14, 1899.

MORAN, KRAUS & MAYER, attorneys for appellants.

GILBERT & GILBERT, attorneys for Nathan Landfield, appellant.

Exemption statutes are to be liberally construed in favor of debtor. *Finlen v. Howard*, 126 Ill. 262; *Morrissey v. Feeley*, 36 Ill. App. 556.

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The rights of creditors to look to partnership property as partnership property is to be by creditors exercised solely through the partners themselves, and such creditors can be deprived of such rights by the arbitrary wish and act of the partners. Hence a sale by one partner to the other is not a fraud upon the firm creditors, though it deprive them of all means of collecting their claims. *Hapgood v. Cornwell*, 48 Ill. 64; *Young v. Clapp*, 147 Ill. 176, and cases cited.

The firm creditors have no lien but only an equity, which they can enforce only after judgment and execution, and not all after the sale by one partner to the other. *Goembel v. Arnett*, 100 Ill. 34.

The rule distinguishing between partnership and other assets is for the "benefit and protection" of the partners themselves. *Farwell v. Huston*, 151 Ill. 239.

CRATTY, JARVIS & CLEVELAND, attorneys for creditors.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is a petition by Nathan Landfield, the assignor, for an allowance of four hundred dollars in cash out of funds in the hands of the assignee, which he prays may be set aside to him as exempt. The petition was denied by the County Court.

The abstract of the testimony is very meager and unsatisfactory. We think it is properly complained of by the objecting creditors. We have also reason to object to the citation of authorities in the brief of the latter's counsel without giving the page of the volumes containing the cases referred to. Carelessness in the preparation of briefs is unjust to the court and may do injustice to the client.

Nathan and Joseph Landfield are brothers, and were co-partners in business. June 24, 1897, they agreed to dissolve partnership, and Joseph executed a bill of sale to Nathan, who assumed all the debts of the firm. About four hours later Nathan made an assignment for the benefit of creditors. Joseph says that he did not know that the firm was insolvent when he made the bill of sale. But the evi-

In Matter of Assignment of Nathan Landfield.

dence tends to show that if he did not know it, he could and ought to have had such knowledge. No effort was made, according to his testimony, to learn the facts. He testifies, however, that he had tried to get certain of the firm creditors to release him, and says that had he been released as he wanted to be, "my brother would not have made any assignment." Creditors were pressing the firm, and an attachment had been issued prior to the making of the bill of sale.

Nathan testifies that he had no idea of making an assignment when the bill of sale was made.

It is impossible, from these facts and this evidence, to avoid the conclusion that the bill of sale and the assignment were parts of one and the same transaction. If this is true, then the assignment executed by Nathan after receiving the bill of sale from Joseph, was the act of both partners, as fully as if Joseph had executed the assignment itself, instead of the bill of sale which gave Nathan the power to assign the partnership assets. The statement of Joseph that the assignment would not have been made had certain creditors released him, is a sufficient, even if inadvertent concession, that the brothers and partners were acting in concert for a common purpose, and that the bill of sale was not a *bona fide* transaction separate and distinct from the assignment made by Nathan immediately thereafter.

A voluntary conveyance of all the firm property to one of the partners of an insolvent firm, has been held to be invalid as against existing firm creditors; and an assignment made by the partner to whom the conveyance has been so made, will be treated in equity as made for the benefit of the partnership in preference to individual creditors. Joseph himself, in this case, might not be able to insist upon the payment of partnership debts, for which he is liable, out of the partnership property which he voluntarily conveyed to Nathan. But the partnership creditors have been held to have equitable rights in the partnership property, upon the ground that such property "is treated as belonging, not to the persons composing the firm, but to

a distinct debtor, the partnership." And this upon the principle that the sale to the individual partner was made to defraud the firm creditors by defeating their equity. It is the fraud which vitiates the transaction between the members of the firm and its creditors. *Arnold v. Hagerman*, 45 New Jersey Equity, 186, 198.

To the validity of such a transfer to an individual member of the firm, good faith has always been held essential. *Phillips v. Ames*, 5 Allen, 183.

Courts of insolvency wind up the affairs of a partnership on equitable principles. *Hoffman v. Schoyer*, 143 Ill. 598-616.

In this case, if the sale to Nathan was made by Joseph for the purpose of obtaining for the former, exemptions at the expense of firm creditors, to which he would not otherwise be entitled, then it was to that extent a fraud upon such creditors.

But as we have said, the bill of sale and assignment were parts of one transaction. The assignment must be treated as made by the firm for the benefit of its creditors. In this view, neither of the partners was or is entitled to exemptions.

It was said in *Wills v. Downs*, 38 Ill. App. 269-273: "Firm assets are a trust fund for the payment of its creditors. The partners individually can have no absolute property in it or any specific part of it until the creditors are fully satisfied." See cases there cited.

The judgment of the County Court is affirmed.

Leopold Schlesinger and David Mayer v. Belle Rogers.

1. **LEADING QUESTIONS**—*What Are and What are Not.*—A question is not necessarily leading, because it can be answered by yes or no. If it also suggests the desired answer, or leads the witness to the answer, then it is leading.

2. **INSTRUCTIONS**—*As to the Weight to be Given to the Testimony of a*

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Party.—In a case where there is a sharp conflict of evidence and it is important that the jury should be correctly instructed, it is error to refuse to instruct that in considering the weight to be given to the testimony of the plaintiff, they have a right to take into consideration that such testimony is given by the plaintiff in the suit.

3. *ATTORNEYS—Rights in Argument Before the Jury.*—Counsel have the right within reasonable and proper limits, in argument before the jury, to call attention to the evidence which, in their judgment, tends to establish the facts the jury are asked to find, either specially or by the general verdict, provided such argument is confined to pointing out the evidence. Mere statements of counsel and requests to the jury to give specific answers not supported by evidence, are, like any other attempts to mislead a jury, always improper.

Assumpsit, for services, etc. Trial in the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendants. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed March 14, 1899.

MORAN, KRAUS & MAYER, attorneys for appellants.

CASE & HOGAN, attorneys for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

Appellee sued to recover under an alleged contract of employment. She claims to have been engaged by appellants for the period from September 17, 1894, until April, 1895, and that she was to receive a salary of \$18 per week, except during February and March, when she was to receive \$12 a week. Appellant's version is, that she was not engaged for any specified time, and that her discharge at the end of one week was owing to incompetency and refusal to do the work for which she was hired.

The contract was verbal, and the testimony as to whether the engagement was for any specific or definite time is conflicting. The arrangement was made between the appellee and one Mrs. Hull, who was in charge of the millinery department of appellants.

The question was put by appellants' counsel to Mrs. Hull, "Was there anything said as to how long she was to be

employed?" The witness answered "No." An objection was made by opposing counsel to this question and answer, which was sustained. The answer was stricken out, and to this ruling appellants excepted.

The question was apparently considered leading. A question is not necessarily leading, because it can be answered by yes or no. If it also suggests the desired answer, or leads the witness to the answer, then it is leading. See Bouvier's Law Dictionary, title, Leading Question.

In the present case we think the question and answer should have been allowed to stand. The witness had already been asked to state what was said by appellee and herself with reference to the terms of her employment, and having answered, it was permissible to direct her attention to the particular matter upon which her evidence was sought. But such questions are so largely within the discretion of the trial court, and it is so easy to repeat a question, avoiding any doubt as to its propriety in this respect, that we should not feel inclined to reverse on that ground. In this case it would have been easy to change the question in accordance with the court's suggestion that the proper form was, "What, if anything?" The witness was subsequently asked whether either she or appellee said anything further with reference to the length of time appellee was to be employed, and answered they did not, thus practically supplying the answer which had been stricken out.

Objection is made to the refusal of appellants' instruction, as follows :

"The jury are instructed that in considering the weight to be given to the testimony of the plaintiff, Belle Rogers, you have a right to take into consideration that such testimony is given by the plaintiff in this suit."

This instruction was proper; and where, as in this case, there is a sharp conflict of evidence and it is important that the jury should be correctly instructed, its refusal was error. *West Chi. St. R. R. Co. v. Dougherty*, 170 Ill. 379-382.

We do not regard the refusal of the defendants' fourth

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instruction as erroneous. Witnesses must have equal opportunities for knowing the facts, as well as equal intelligence, truthfulness and fairness, if their number is to create a preponderance.

The refusal of other instructions is objected to, but the reasons for objection are not pointed out.

It is contended that appellee's counsel was improperly permitted to tell the jury what answers they should, in his opinion, make to the questions submitted for special findings.

Counsel have the right, within reasonable and proper limits, in argument before the jury, to call attention to the evidence which, in their judgment, tends to establish the facts the jury are asked to find, either specially or by the general verdict; provided such argument is confined to pointing out the evidence. Mere statements of counsel and requests to the jury to give specific answers not supported by evidence, are, like any attempts to mislead a jury, always improper.

As the case must be sent back for new trial, we forbear further comment.

For the reasons indicated, the judgment must be reversed and the cause remanded.

Ernest Hill v. Western Union Cold Storage Co.

1. INSTRUCTIONS—*To Find for the Defendant—When Improper.*—Where there is evidence fairly tending to sustain the issues in behalf of the plaintiff, the weight of which ought to be submitted to the jury, the trial court may properly refuse to instruct the jury to find for the defendant.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding. Judgment for defendant by direction of the Court. Appeal by plaintiff. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed March 14, 1899.

This action was brought by appellant to recover for injuries to his person by being thrown from an elevator.

The second count to the amended declaration is the only one that remained in the case to the end of the trial.

That count alleges that the defendant (appellee) maintained a cold storage warehouse and rented space in the same to various persons for the purpose of storing goods; that the control and management of the building and machinery therein was at all times in said defendant; that said defendant maintained within said building an elevator for the purpose of hoisting merchandise and carrying persons renting space in said building, and the employes of persons renting space in said building; that the defendant permitted employes of persons renting space, who were in said building on their employer's business, to use said elevator and the various ropes or cables controlling and used in operating said elevator; that the plaintiff, prior to the 9th day of July, 1895, was employed in said building and was permitted by the defendant to use the elevator and cables or ropes controlling said elevator, and that at no time prior to the 9th day of July, 1895, had he become aware of or had any notice of any defect in said elevator or machinery controlling and operating the same; that it was then and there the duty of said defendant to furnish, employ and maintain safe and perfect machinery in connection with and to be used in and about said elevator; that on the 9th day of July, 1895, plaintiff was employed by M. J. Power, a person who had rented storage space in said building; that plaintiff's duties were to examine certain merchandise belonging to his employer, which were stored on the fifth floor of said building; that at five o'clock in the afternoon of the 9th of July, 1895, plaintiff was on the fifth floor of said building, and while using all due care and caution, approached said elevator and pulled the rope or cable controlling or used in operating the same; that said elevator arose from one of the lower floors to the fifth floor, whereupon the plaintiff reversed said rope or cable, and said elevator came to a stop and remained stationary at the landing of said fifth floor;

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that plaintiff, while using all due care and caution, stepped forward and came upon the floor or platform of said elevator, and that then and there, and immediately after he came upon said floor or platform, said elevator suddenly and without any warning whatever, bounded, jumped, jerked, or shot upward by reason of the carelessness, recklessness and negligence of the defendant in allowing air to accumulate in the hydraulic cylinder used in connection with the operation of said elevator; that in consequence of said negligence, plaintiff was violently thrown, pushed or jerked from said elevator and caused to fall down the cylinder shaft connected with said elevator, whereby, etc.

It will be observed that the only negligence charged in the declaration is in allowing air to accumulate in the cylinder used in connection with the operation of the elevator.

It was admitted by the defendant, at the trial, that it was operating the building; that there was an elevator therein, and that plaintiff was hurt while trying to operate the elevator.

The plea of the general issue, which was the only plea, put in issue all other material facts.

At the conclusion of all the evidence the trial judge directed a verdict of not guilty, and judgment was entered upon the verdict. The plaintiff now appeals.

PARKER & PAIN, attorneys for appellant.

The motion to exclude the entire evidence from the jury, and to instruct the jury to find for the defendant, is in the nature of a demurrer to evidence, in this, that it admits not only all that the testimony proves, but also all that it tends to prove. *Bartelott v. International Bank*, 119 Ill. 259; *Chicago & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 132.

It is only where the evidence, with all fair and legitimate inferences therefrom, is so insufficient to sustain a verdict for the plaintiff that the court must set it aside if rendered, that the court will be justified in directing a verdict for the defendant. *Pullman Palace Car Co. v. Laack*, 143 Ill. 251, 252; *Siddall v. Jansen*, 168 Ill. 43; *Chicago & Alton Ry.*

Co. v. Adler, 129 Ill. 335; Simmons v. Chicago, etc., R. R. Co., 110 Ill. 346; C., R. I. & P. Ry. Co. v. Lewis, 109 Ill. 120; Goodrich v. Lincoln, 93 Ill. 360; Phillips v. Dickerson, 85 Ill. 11; L. S. & M. S. R. R. v. Johnsen, 135 Ill. 641; Purdy v. Hall, 134 Ill. 298; L. S. & M. S. R. R. v. Richards, 152 Ill. 59.

In cases where there is no evidence tending to support the judgment, or where the evidence is so insufficient that the trial court would be required to set the verdict aside on the ground that there was no evidence to sustain it, in case a verdict should be rendered for the plaintiff, the court might properly instruct the jury to find for the defendant. Weber Wagon Co. v. Kehl, 139 Ill. 644.

Where there is some evidence tending to support every essential allegation in the declaration, it is the province of the jury to say how much weight is to be given such evidence, and to determine whether the evidence is insufficient to prove the proposition. Poleman v. Johnson, 84 Ill. 269.

Also where the evidence given at a trial with the inferences properly arising therefrom are not insufficient to support the verdict in the plaintiff's favor, an instruction to the jury to find for the defendant will be properly overruled. Chicago Drop Foundry Co. v. Van Dam, 149 Ill. 337.

Where there is evidence tending to prove a cause of action, it is an invasion of the province of the jury to instruct them that the plaintiff can not recover. Chicago & West Division Ry. Co. v. Mills, 105 Ill. 63; The Wight Fire Proofing Co. v. Poczekai, 130 Ill. 139.

It is a settled doctrine of the Illinois courts that what is or is not negligence in a particular case, is a question of fact to be found by the jury. Chicago & Alton Ry. Co. v. Bonifield, 104 Ill. 223.

In Cicero & Proviso St. Ry. Co. v. Meixner, 160 Ill., the court, at page 323, says:

"Negligence is ordinarily a question of fact. Where the evidence on material facts is conflicting, or where on disputed facts fair-minded men of ordinary intelligence may differ as to the inferences to be drawn, or where on even a

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conceded state of facts a different conclusion would reasonably be reached by different minds, in all such cases, negligence is a question of fact. With all the facts considered, if there is a reasonable chance of conclusions differing therefrom, then it is a question for the jury."

What is ordinary care, depends on the circumstances of each individual case. *West Chicago St. Ry. Co. v. Manning*, 170 Ill. 417.

What was the proximate cause of the injury was a question of fact which should have been left to the jury to determine. *West Chicago St. Ry. Co. v. Feldstein*, 169 Ill. 139.

JOHN A. POST and JOHN B. BRADY, attorneys for appellee.

A mere scintilla of evidence, tending to prove a certain fact, does not justify a court in leaving a case to a jury. There must be evidence upon which the jury can reasonably and properly conclude that such fact exists. The question is not whether there is no evidence to prove the fact, but whether it is sufficient. *Wheelton v. Hardisty*, 8 El. & Bl. 231; *Beaulieu v. Portland Co.*, 48 Me. 291; *Ryer v. Wambwell, L. R.*, 4 Ex. Ch. 32; *M. R. Co. v. Jackson, L. R.*, 3 App. Cas. 193; *Com. of Marion Co. v. Clark*, 94 U. S. 278.

Where the evidence will not warrant a verdict in favor of the party producing it, the court should direct a verdict. *Tefft v. Ashbaugh*, 13 Ill. 602; *Abend v. Terre Haute, etc., R. R. Co.*, 111 Ill. 202; *Doane v. Lockwood*, 115 Ill. 490; *Penn Co. v. Backes*, 133 Ill. 255; *Ward v. Chicago*, 15 Ill. App. 98; *Phillips v. Dickerson*, 85 Ill. 11; *Simmons v. Chicago, etc., R. R. Co.*, 110 Ill. 340; *Com. Ins. Co. v. Scammon*, 123 Ill. 601; *Eddy v. Gage*, 147 Ill. 162; *Anderson v. McCormick*, 129 Ill. 308; *Roden v. Chicago, etc., R. Co.*, 30 Ill. App. 354; *Edwards v. Hushing*, 31 Ill. App. 223; *Spannagle v. Chicago, etc., R. R. Co.*, 31 Ill. App. 460; *Huschle v. Morris*, 31 Ill. App. 545; *Duggan v. Peoria, etc., R. R. Co.*, 42 Ill. App. 536; *Foster v. Wadsworth-Howland Co.*, 48 N. E. 163; *Siddall v. Jansen*, 48 N. E. 191.

There may be decisions to be found which hold that if there is any evidence—even a scintilla—tending to support

the plaintiff's case, it must be submitted to the jury. But we think the more reasonable rule, which has now come to be established by the better authority, is, that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff, that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Simmons v. Chicago & Tomah R. Co.*, 110 Ill. 340; *Pleasants v. Fant*, 22 Wall. 120; *Randall v. Balt. & Ohio R. Co.*, 109 U. S. 478; *Metropolitan R. Co. v. Jackson*, 3 App. Cas. 193; *Reed v. Inhabitants of Deerfield*, 8 Allen, 522; *Skelenger v. Chi. & N. W. R. Co.*, 61 Iowa, 714; *Martin v. Chambers*, 84 Ill. 579; *Phillips v. Dickerson*, 85 Ill. 11.

Where the undisputed evidence so conclusively proves a certain fact that the court would be compelled to grant a new trial, because a verdict to the contrary would be against the weight of the evidence, the court may take the case from the jury. 16 Am. & Eng. Enc. of Law, 466; *Ft. S., C. & M. Co. v. Sweeney*, 15 Kan. 244; *Werk v. Ill. Steel Co.*, 54 Ill. App. 302; *Werk v. Steel Co.*, 154 Ill. 427; *Bloch v. Swift & Co.*, 161 Ill. 107; *C. & N. W. Ry. Co. v. Hansen*, 166 Ill. 623; *Denny v. Williams*, 5 Allen (Mass.), 1.

Where an instruction is given or asked at the close of the plaintiff's testimony, instructing the jury to return a verdict at that stage of the case, the only question raised by the instruction, and the only one which can be considered by this court, is whether or not there was at that time evidence tending to prove the averments of plaintiff's declaration. *Cicero & P. R. Co. v. Meixner*, 160 Ill. 320; 43 N. W. 823; *Pullman Car Co. v. Laack*, 143 Ill. 242; 32 N. E. 285; *Simmons v. Ry. Co.*, 110 Ill. 346; *C., R. I. & P. Ry. Co. v. Lewis*, 109 Ill. 120; *Goodrich v. Lincoln*, 93 Ill. 360; *Phillips v. Dickerson*, 85 Ill. 11; *L. S. & M. S. R. R. Co. v. Johnsen*, 135 Ill. 641, 26 N. E. 510; *Purdy v. Hall*, 134 Ill. 298, 25 N. E. Rep. 645.

Where, however, the motion to instruct the jury to return a verdict for defendant is made at the close of all the

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evidence in the case, and allowed by the court, it must be that the evidence, both for the plaintiff and defendant, with all the inferences which the jury might justifiably draw therefrom, is not sufficient to support a verdict for the plaintiff if one should be returned. *L. S. & M. S. R. R. Co. v. Richards*, 152 Ill. 59, 38 N. E. 773, and authorities cited; *Siddall v. Jansen et al.*, 48 N. E. 191.

MR. JUSTICE SHEPARD delivered the opinion of the court.

It can not be seriously questioned but that there was abundant evidence to go to the jury upon the controversy as to whether or not permission, express or implied, was given by the superintendent of the defendant corporation to the appellant to use the elevator, and it was admitted, upon the trial, that "there is no dispute that Hill (appellant) used the elevator from three to five times a day." The jury should not have been cut off from their right to consider the evidence upon both sides of that question and determine what the truth was in that regard, if a sufficient case in other respects was made out for them to found a verdict upon.

The most important inquiry is as to whether there was, or not, sufficient evidence upon the specific negligence charged in the declaration, in allowing air to accumulate in the cylinder, to require the case to go to the jury.

And the inquiry is so controlling as to demand that we go to the evidence, and all of it, upon that point.

The plaintiff testified:

"When I pulled the elevator up it came up and stopped flush at the fifth floor; I am satisfied that the elevator was not bobbing or moving at that time. About twenty seconds elapsed between the time that I brought the elevator to a stop and threw up the gate and got upon it; and just as I got on the elevator it suddenly shot up, jerked or jumped. All I know is there was a sudden upward movement; I do not know what caused it; I never knew it to happen before."

Forslund, an expert in the manufacture and inspection of elevators, testified in behalf of plaintiff, that he was

familiar with every part of the Hale hydraulic elevator, and that he knew the one in question, and being specifically questioned, he testified as followed :

“ Q. Suppose this particular elevator was stationery at one of the floors of the building, and that a person, weighing perhaps 155 pounds, should step upon that elevator and it should jump violently with him, what would be the cause of such jumping? A. Any hydraulic elevator might act in that manner under certain conditions; not alone a Hale elevator but any other elevator might act in the same way. It may be attributable to any one cause. I say there may be more than one cause. I want to qualify that remark that it might be attributable to any other cause. There is one cause alone wherein an elevator would jump violently, in my opinion.

THE COURT: Only one cause?

A. Yes, sir; when it would jump violently or suddenly or radically.

Q. What is the cause that you refer to? A. I will say that it would be the presence of air in the cylinder. The presence of air would make an elevator jump very violently or quickly or without any warning scarcely, and it would be brought about by a load on the elevator. The air is very elastic, and the more air in the cylinder the more erratic the elevator would become. I should say that the cock that is used to free the cylinder of air should be operated at the farthest every two days. It should be opened to allow this air to escape every two days at the very farthest. Water brings a certain quantity of air into the cylinder. Air will accumulate in all hydraulic elevators if there are no means of getting rid of the air either automatically or by hand. There would be a small accumulation of air in smaller or larger quantities, depending on the location of the machine and its character and the way it was put up—the way the pipes are put in that lead to it.

Cross-examination.

I was an elevator inspector two years. I think I examined this elevator just seven days before the accident. I can not answer with certainty whether my assistant or I examined this elevator; my assistant will go around with me and he would examine the elevator and I would mark the card O K. I did this continuously. Air accumulates in nearly every kind of an elevator; it is bound to, more or

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less. I never said this Hale elevator was any great exception to the general rule. In a case where elevators bob, it is because the valve is not shut off, or because the pistons leak more or less, or the valves and the water is not confined on every side of the piston so as to hold the piston perfectly stationery. I don't say absolutely that the sudden upward or forward movement of the elevator was caused by air being in the cylinder. I say that might have been the cause. There might be other causes. The valve might give way and allow the water to back up under this piston and then the water on top of the piston would drive the elevator up; that might happen instantaneously. Or the breaking of a pipe might cause it.

Q. How long would it take for air to get into the hydraulic cylinder and cause a sudden upward movement? About what length of time would have to elapse? A. Well, that sudden upward movement would never occur unless the elevator was touched by some weight. I could not say how long it would take to get enough air into the hydraulic cylinder to make it take that sudden upward movement. This air accumulation might be there, and a sudden weight being placed there at that time might let loose those check valves, and that would cause it to jump. Any air there might have been accumulated in that piston, and the check valve might have been stopped or stuck in some manner, so that a sudden shock released it. That released the check valve, and the air in there drove the piston down. I made such an examination as inspectors ordinarily make. I didn't discover any air about the cylinder, because I didn't try; it might have been there only a day or two. Air might have been there in a small quantity on the day that I inspected the elevator. It could have been there in a sufficient quantity to make the elevator move when a man stepped on it, if the check valve opened suddenly; that check valve is supposed to be always openable. I didn't say I could not have discovered air if there was any there at that time. I say I could not, with the examination that I made. If there is air in the piston, you could hear it when it blew out; you could feel it. I have many times myself gone up and let the air off. I did not notice any in this case, or it was not noticed. I did not say there was any air there at that time when that elevator was examined; why, I always see if there is any air in the cylinder. According to the question put, I should say there might have been air there at the time of the accident.

Re-direct Examination.

If this valve had broken so that the water passed through the piston, they could not run the elevator at all. If a pipe had broken they could not run the elevator until after repairs had been made."

Knuth, the chief engineer for the defendant corporation, being called for the plaintiff, testified:

"I examined the hydraulic elevator, as a rule, about once a week. I don't know whether I had examined the elevator on the day of the accident, but the last time that I examined it would not have been any longer than a week previous to the accident."

And afterward, being called as a witness for defendant, he testified as follows:

"The first intimation that I had of the accident was through the superintendent, Mr. Lewis; he informed me of the fact. I went over to the building that this elevator was in, and took a trip up and down on that elevator to satisfy myself that it was in first-class running condition. The elevator moved just the same as it ordinarily did. There was no unusual jerkage in the elevator that I remember; if there had been any I would remember it. It operated all right. I got on the elevator and operated it from the ground floor to the top floor and return. There was no air accumulated in the hydraulic cylinder at that time that I could observe. The way that I always had of determining whether a cylinder had air in it or not, was to stop it as near a floor or landing as possible, and let it remain there, and see if it would vibrate from that place. I have always found in my experience that by stopping an elevator that has any air in the cylinder, it will vibrate more or less and leave that position.

MR. BRADY: Could there have been any air in there thirty minutes before that, and it operated as you say it did? A. No, I think not; but it could have been relieved in the meantime.

Q. How could you get at it to relieve it? A. Open the pet cock on the top of the cylinder. There is a ventilating cock on the top of the cylinder.

Q. Is this ventilating cock an automatic one, or is it one that an engineer or the person in charge of the machinery, operates? A. It is one that the engineer operates.

Q. Do you know whether or not that cock had been used in any way from the last time that you used it, up to

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this time that you rode up on the elevator? A. I could not say positively. The principal cause for air accumulating in the cylinder is whenever there is any work being performed on that cylinder; for instance in packing the rods, shutting off the supply, poking out the stuffing-box connected with the rod, and replacing it by new packing, that admits air into the cylinder. Ordinarily, when the condition of the elevator is all right, and no work having been done on it, there is very little air accumulates. I can not positively say that there had been any work done within two or three days previous to the injury to this man.

Cross-examination.

The cock that lets out the air from the cylinder is situated right on the head of the cylinder. The cylinder is between the second and third floors; it reaches a number of feet above the second floor. The cock is tapped right on to the top head of the cylinder; it is a piece of pipe tapped into the top head; there is a pet cock on the end of that pipe. I did not examine this cock at that time, after the accident. I could not state when, before this time, I had examined this cock or valve. I had no occasion to examine that from the fact that there had been no trouble reported from the elevator. It is only customary to examine that in case there was any trouble reported from the elevator. I don't remember exactly when this elevator was repacked; it was not two months, because the elevator required packing oftener than that. I think at that particular time we had to repack it every two weeks. I have said that after repacking, was the time that air would accumulate in the cylinder. I did not explain what the method was of removing the air. I don't know whether or not there was any air in the cylinder before the day of the accident. In cases of repacking, where the air has not been removed, the elevator would vibrate a little; not to any great extent. It would not jump from the floor if it was at a standstill and was stationary, and there was no air in the cylinder. All I did on that day to determine whether the elevator was in perfect condition, was to ride up and down on it and to bring it to a standstill at the landing of the floors in the building.

Re-direct Examination.

The custom in removing that air from the cylinder after any work having been done on it, is to open this pet cock

after the work is done and then turn on the water, and the water pressure drives the air out of this pet cock, in that way relieving the cylinder from the air. That cock is left open to the air and the pressure of the water upward drives the air out and it is allowed to remain open until the water comes up to it and then it is shut off. I could not say positively that I was the first one to use the elevator after the accident. I could not say positively where I found the elevator when I got to the building; it might have been on the same floor or another. I simply took the elevator from the first floor and went to the top floor and came down again."

Lewis, the superintendent of the defendant corporation, testified in its behalf, upon this subject, as follows:

"On the day that plaintiff was injured I rode on this elevator; it worked normal. I didn't notice at that time or any other time any bounding, jumping, jerking or upward movement of the elevator. I probably rode five or six times on the elevator on the day of the accident. After the accident, about 6 o'clock, I made a trip on the elevator. It worked normal. I didn't notice any bounding, jumping or jerking. I had never been notified by an employe of the defendant or any one else for six weeks previous to the injury, that there was any bounding, jumping or jerking of the elevator."

Scully, an employe of defendant, testifying upon this subject said:

"I might have ridden on the elevator ten or twenty times that day. I rode on it every working day and had done so for a week or two previous. The elevator moved up and down in response to the cables, as it should, in the usual way. I did not notice any jumping, bounding, jerking or sudden upward movement."

Two other employes of defendant testified about the condition of the elevator. One of them said he rode upon it about two o'clock in the afternoon of the day of the accident, and found it all right. The other one said he used the elevator about fifteen minutes after the accident, and it then moved all right.

From such evidence, taking also into consideration other evidence, tending *pro* and *con* to establish that the plaintiff was intoxicated when he attempted to handle and get

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aboard the elevator, and that the elevator did not stop at the fifth floor, where he stood and was working it, but continued to ascend past that floor, and that plaintiff did not get aboard it at all, but missed his step, and so was precipitated down the shaft, and considering also the evidence tending to impeach the credibility of one, or more, of defendant's witnesses, we might, if we were acting as a jury, conclude that the preponderance and weight of the evidence was with the defendant, or we might not. But that is not the question we are bound to consider at this time. It is only whether there was, or not, evidence fairly tending to sustain the issues in behalf of the plaintiff, the weight whereof ought to be submitted to the jury. If there was, then the trial court should have refused to instruct the jury to find for the defendant. The latest rulings on that point are all we need refer to. *L. E. & W. R. R. Co. v. Morrissey*, 177 Ill. 376; *McGregor v. Reid*, 178 Ill. 464.

This last cited case (*McGregor v. Reid*) was one in which this court, affirming the action of the court below in directing a verdict of not guilty (76 Ill. App. 610), was reversed, and has numerous features similar to those now before us. There, the Supreme Court holds that if it be true that there was no evidence upon which the jury, acting reasonably within the rules of law, could base a verdict against the owners of the elevator there in question, and which would have been sufficient in law to support such a verdict if it had been found, the instruction to find for the defendant was properly given, but otherwise not. And the court, reiterating what it has often before held, said:

"All that the evidence tends to prove, and all just inferences to be drawn from it in appellant's (plaintiff's) favor, must be conceded to him." * * * "Under the rule, the evidence most favorable to appellee must be taken as true."

And the testimony, though of but one witness, strongly combated upon the ground that it had been refuted and overcome by other evidence in the case, could neither be denied nor ignored by the court in passing upon the instruction; and added that the jury might have believed that witness, and

found, from his testimony, that the elevator was not in good working order, etc. And, continuing, said :

“The credibility of the witnesses, the weight of the testimony, the drawing of the inferences from the facts proved, were all questions of fact for the jury to pass upon, and not for the court to decide.”

The opinion in the McGregor case deals with several other questions in this record, and, not being yet reported, may properly be quoted from at considerable length as more authoritative and instructive than anything we could say, as follows :

“Thus, it appeared that the safety device was out of order from the fact (in connection with the testimony of Jallinger) that the elevator fell. It was a question for the jury whether or not the appellee knew this, or whether or not it had been in this defective condition long enough for the appellee, by the use of ordinary care and diligence, to have discovered it, and it was not for the court to say, as a matter of law, that an inspection twice a year by city officers, and four times a year by an agent of the indemnity company, was sufficient to discharge appellee from all responsibility for its defective condition. These were evidentiary facts, which should have been submitted, with all other evidence bearing upon the questions at issue, to the jury.

It might be that appellee was satisfied if the indemnity company was satisfied; but this would not change its relation to its employes, nor its duty to provide them with ordinarily safe places, appliances and means, in, by and with which to perform the tasks which had been allotted to them, in their employment. The duty was commensurate with the dangers incident to the service, and if it required a high degree of care, by making frequent examinations and applying frequent tests, to keep the ‘dogs’ or safety device attached to the elevator in working order and in a safe condition, so as to make the use of the elevator reasonably safe, it was the duty of the appellee to make such examinations and apply such tests. Nor would the assumption by appellant of such dangers as were incident to his service relieve appellee from its duties in the respects mentioned. He did not have charge of the elevator, nor, as appears from the evidence in the record, was it any part of his duty to give it any care or attention. Nor does it appear that he had any knowledge of the dangers attending its use, or of the appliance attached to keep it from falling. At

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all events, whatever might have been the verdict of the jury, had the case been submitted, we are satisfied the court erred in directing a verdict, and that the Appellate Court erred in affirming the judgment."

A slight paraphrasing would make the language quoted as applicable to the facts of this case as to that one.

Now, applying this reasoning and authority to the facts we have quoted, we can not hesitate in holding that the question of whether the defendant was negligent in respect of the accumulation of air in the cylinder, was one that ought to have been submitted to the jury, and that the trial court erred in taking it away from them.

The judgment is reversed and the cause remanded.

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1. MASTER AND SERVANT—*Master, When Exempt from the Fellow-servant rule.*—Where the master has used ordinary care in the selection of the servant he is not responsible, because of their relation of fellow-servants, for an injury occurring, through such servant's neglect, to another servant.

2. SAME—*Not Bound to Assume that the Servant Will Choose Hazardous Methods.*—An employer is not bound to act on the assumption that his employes will choose inconvenient and hazardous methods of their own volition.

3. SAME—*Master Required to Use Reasonable Care and Diligence.*—The law requires the employer to use reasonable care and diligence in providing suitable and safe machinery and appliances for the use of those engaged in his service, but if he fails in this regard, and the employe discovers that the machinery or appliances are unfit for use, dangerous or insufficient, it is his duty to quit the service. If he remains he does so at his own risk.

4. SAME—*Obligations of the Relation.*—The relation of master and servant implies no obligation on the part of the master to take more care of the servant than the servant is willing to take of himself.

Trespass on the Case, for personal injuries. Error to the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Reversed. Opinion filed March 14, 1899.

This is a suit to recover for personal injuries. At the time he received the injury complained of, appellee had been in the employ of appellants for about six weeks, acting a part of the time as foreman over gangs of men engaged in burning brush and excavating dirt from the Drainage Canal. January 6, 1893, the date of the accident, he was directed by one Burns, appellants' general foreman, to turn his men over to some one else, and to help one Morse, a carpenter, who was at work upon a bridge. Appellee says he told Burns that he was not a carpenter and knew nothing about bridge building; but the foreman replied, "Go right along and do what Charlie tells you and you will be all right."

Morse took appellee with him and went to the work. At first, appellee says, he "went to level the stone that was inside the abutment, and after I got them down, Morse says, 'We will get the timber out,' and he took the dolly down and laid it on the runway, and took a cant hook." Appellee says the "runway was about four feet wide and 140 feet long and about ten feet above the ice in the river. The planks rested on some kind of stringers laid across from one abutment to the other." That runway had been constructed "to handle these heavy timbers," and was made level in order "to run across" it the timbers to be used as stringers, which Morse and appellee were engaged in moving when the accident occurred. Appellee describes the "dolly" as made of three-inch material, square, with the roller in the center, "probably fourteen to eighteen inches," and thinks "the roller was four inches in diameter." The first timber was placed on this "dolly" by Morse and appellee, Morse taking the big end. After going with it a few feet upon the runway, appellee says they came to a standstill, and Morse asked one Flynn to give a push, which he did. Appellee testifies, "After we got fairly started, * * * we rolled the timber along quite a distance and, all at once, it went off. The dolly went down on the ice and the timber over on the abutments and remained there. We left that timber there. Then Morse

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told me to go on back and get another timber. I did so. He went down to get the dolly on the river. It was lying on the ice, in the river, right below the runway. I suppose he took the same dolly back for the next timber." Going back, Morse and appellee took another timber, about the same size as the first. Appellee says that both timbers were round, and had not been hewn off at all.

They placed this second timber on the dolly in the same way as before, and started across. Again they "got stuck with it," and Morse called to Brown, the timekeeper for appellants, who took hold "and gave a lift," as appellee testifies. Appellee was pushing at the rear end, and Morse was in front. After Brown gave them the lift, he stepped behind appellee, who says that they went ahead, probably thirty or forty feet, and then the timber and dolly went down into the river, the big end going first. Morse says the other end rested on the runway. As the timber went off, the end of it struck appellee's leg, throwing him against an abutment, from which he fell upon the ice below, and for injuries alleged to have been thus caused he brings suit.

JOHN A. Post, attorney for appellants, SAMUEL S. PAGE, of counsel, contended only for a reversal of the judgment without a remanding order, and rely alone upon those assignments of error which are germane to that purpose.

Appellee and Morse and whoever assisted in the operating and handling the timber and dolly in question, were, in so doing, fellow-servants. *M. & O. R. R. Co. v. Godfrey*, 155 Ill. 78; *Clay v. C., B. & Q. R. R. Co.*, 56 Ill. App. 236; *I. C. R. R. Co. v. Swisher*, 61 Ill. App. 612; *Crispin v. Babbitt*, 81 N. Y. 516; *Hussey v. Coger*, 112 N. Y. 614.

Appellee assumed the risk. *East St. Louis Ice & C. S. Co. v. Sculley*, 63 Ill. App. 147; *Jones v. Roberts*, 57 Ill. App. 56; *Swift & Co. v. Rutkowski*, 167 Ill. 159.

There was no duty on appellants to furnish any more men than they did. *Karr Supply Co. v. Kroenig*, 167 Ill. 563; *Swift & Co. v. Rutkowski*, 167 Ill. 159.

Incompetent evidence, admitted at the trial over objection, should be treated as out of the record and should not be considered in support of the verdict *Kiehn v. Bestor*, 30 Ill. App. 459.

Appellee must recover upon the very terms of his declaration or not at all. *Ebsery v. C. C. Ry. Co.*, 164 Ill. 523.

Where there is no competent evidence reasonably tending to sustain the allegations of the declaration, and the trial court has refused to take the case from the jury, the Appellate Court should reverse without remanding. *Practice Act*, 81, 3 Starr & C. 3107; *Manistee L. Co. v. Union Nat. Bank*, 143 Ill. 490; *Borg v. C., R. I. & P. Ry. Co.*, 162 Ill. 348.

The fact alone of failing to furnish a sufficient or specified number of men to do or assist in doing the work in question, does not constitute a cause of action. *Swift & Co. v. Rutkowski*, 167 Ill. 156.

DARROW, THOMAS & THOMPSON, attorneys for appellee.

The servant does not undertake to incur the risks arising from the want of sufficient and skillful co-laborers, or from defective machinery or other instruments with which he is to work. His contract implies that, in regard to these matters, his employer will make adequate provision that no danger shall ensue to him. *Booth v. Boston & Albany R. Co.*, 73 N. Y. 38; *Northern Pacific R. Co. v. Herbert*, 116 U. S. 642; *Flike v. Boston & Albany R. Co.*, 53 N. Y. 549; *Shearman & Redfield on Negligence* (5th Ed.), Sec. 193.

The tendency of modern authority is clearly toward the view which holds that the master may be responsible for injuries which the employe receives in doing work outside of the employment for which he is hired when the master has been guilty of negligence which, had the work been that contemplated by the original contract, would have rendered him liable, and when the extra work was undertaken by the employe at the command or explicit direction of the master or his agent. *Buswell on the Law of Personal Injuries*, Sec. 212; *Lalor, Adm'x, etc., v. C., B. & Q.*

R. Co., 52 Ill. 401; Banks, Adm'x, v. City of Effingham, 63 Ill. App. 221.

MR. PRESIDING JUSTICE FREEMAN, after making the foregoing statement, delivered the opinion of the court.

The amended declaration contained two counts. The first charged that the injury was caused in consequence of the defendants having furnished an "unsafe, unsuitable and defective dolly." The second count alleges that defendants "failed to furnish any person to assist said boss carpenter and plaintiff," and that "in order to move said timber properly and with reasonable safety along said runway, it was necessary for defendants to furnish for such purpose a number of men, to wit, five men to hold said timber in place upon said dolly, and to prevent said timber from rolling, falling or shifting" while being moved.

Upon a former trial, when the only issue submitted to the jury is said to have been, whether the dolly was defective and unsafe, a verdict was returned in favor of the defendants.

A new trial having been obtained, the Superior Court took the case from the jury upon the question of a defective dolly, and submitted only the issue as to negligence of the defendants in failing to furnish a sufficient number of men to move the timber properly and with reasonable safety. Upon this issue the jury found the defendants guilty, and the latter appeal from the judgment against them.

Appellants' first contention is that appellee and Morse were fellow-servants, and that appellee assumed the risks incident to the particular work in question.

That they were fellow-servants is not denied. Appellee, at the time of the accident, was assisting the carpenter. While the latter was directing the work, the two were, nevertheless, doing it together. It does not appear that the carpenter had any authority except to tell appellee what to do in the way of helping. The rule relating to fellow-servants, where one has power to control and direct others with respect to the employment, is stated in C. & A. R. R. Co. v. May, 108 Ill., on page 299.

In *M. & O. R. R. Co. v. Godfrey*, 155 Ill. 83, it is said that "where the master has complied with his non-assignable duty of using ordinary care in the selection of a servant to whom such duties are intrusted, for an injury occurring through such servant's neglect, to another servant, the master is not responsible, because their relation is that of fellow-servants."

It is not claimed that Morse was not a suitable man for the work. He and appellee were working together side by side, at the same work at the same time, under the same conditions, and assuming the same risks. Morse had, so far as appears, no power over appellee to compel him to do the work in any particular manner, nor to discharge him if he objected. He did not object, and assumed such risk as was apparent.

The declaration charges negligence in not furnishing more men to help appellee and Morse move the timbers with safety.

There were three men there at the time of the accident—appellee, Morse and Brown. The latter, after having given a push to help start the timber over the "up grade" obstacle, was following along some eight or ten feet in the rear. No call was made on him for assistance in keeping the log from rolling off. Apparently it was not deemed necessary.

It is said by appellee's counsel, "This was a round log, and placed upon a dolly with a flat surface, and the log was not blocked or fastened in any way upon the dolly. It simply lay there loose to be held on by the men who were moving it."

It is not alleged in the declaration that the injury was occasioned by failure to block or fasten the timber upon the dolly, although testimony introduced in behalf of appellee tends to show that such may have been the case. If so, the evidence does not justify recovery on that ground, even if the declaration warranted. There is no evidence that appellants had any notice or knowledge that these men would undertake to shove a heavy round timber,

liable to roll, across a narrow runway some four feet wide, without taking the ordinary and obvious precaution of blocking it in some way upon the dolly to prevent its rolling off. The evidence in no way connects appellants with the failure to so block the timber. It is not suggested that they are in any way responsible therefor. The contention of appellee's counsel seems to be, that because appellee and his co-laborer did not use this precaution to prevent the timber from rolling in obedience to natural laws, and because the two men did not or could not prevent its going off when it began to roll as they were moving it, therefore the employer was bound to furnish men enough to hold it in position, without blocking, by main strength; and this would require enough men to pick it up and carry it, according to some of appellee's witnesses. In other words, no matter how negligent of an obvious precaution appellee and his co-laborers were, the employer was bound to foresee such negligence and furnish men enough to insure against injury by substituting physical force for the appliance ordinarily used.

We do not understand this to be the law. An employer is not bound to act on the assumption that his employes will choose inconvenient and hazardous methods of their own volition. *Karr Supply Co. v. Kroenig*, 167 Ill. 560.

But, say appellee's counsel, "All of those who have been called as experts testified that it takes more men where the timber is round and where it is not blocked," and "it must be plain that a greater number of men would be required than if the timber had been square or if it had been securely fastened." Does it require an expert to prove that a round timber will roll more readily than a square one? Did it require an expert to inform appellee of that fact? And whose fault was it that it was not blocked? Certainly not the fault of the appellants, so far as appears from this record.

Appellee testifies that he knew the timber was round; knew that it was liable to roll, and knew there was no blocking. One of his experts testified, "It is almost im-

possible to handle round timbers on a dolly without having it well blocked and secured." And another says, "There ought to be men on each side of the dolly to keep it in the center or it ought to be blocked." He also says, "There would be no danger of the timber going off if it was properly blocked. In that case the men would not have to hold it on, but would have to shove. It would take five men for the muscular power necessary."

It is not claimed that the accident was caused by the lack of muscular power to move the timber. According to appellee's witnesses, more muscular power was necessary to hold the timber in place because it was not blocked. Each of the three witnesses called as experts in behalf of the appellee, to testify how many men would be required to safely move the timber, based their testimony in that regard on the assumption that no blocks or chips or wedges were used to hold it.

"The law requires the employer to use reasonable care and diligence in providing suitable and safe machinery and appliances for the use of those engaged in his service, but if the employer fails in this regard, when the employe discovers that the machinery or appliances are unfit for use or dangerous or insufficient, it is his duty to quit the service of the employer; but if he remains, he does so at his own risk. So in this case. If it was the duty of appellants to employ more help in order to render the performance of the labor appellee was employed to perform reasonably safe, and appellant failed in that duty, when that fact was discovered by appellee it was his duty to quit appellant's service; but if he remained he did so at his own risk." *Swift v. Rutkowski*, 167 Ill. 156.

Here there is no evidence that the employer had failed to provide suitable and safe appliances, no evidence at all indicating that material for blocking or wedging was not at hand. If the jury found that appellee had no knowledge or notice, and by the use of ordinary care and caution could not have had, of the risk or danger attendant upon the work, such finding is not supported by the evidence. Appellee, in his testimony, apparently intends to convey the impression that the first timber "went off all at once,"

before it was intended to, and says, on cross-examination, "I don't know whether we had got this log to the place where it was wanted or not." By his own statement, he knew and had just observed that such a timber would roll off, and roll off suddenly. If this was so, he had notice of the very danger which caused the accident.

The evidence does not show that a sufficient number of men were not furnished, if any precaution had been taken to prevent the timber from rolling by wedging or blocking it on the dolly, and does not sustain the declaration. The injury was not caused by lack of men, but by lack of an ordinary precaution, for which appellants are not responsible.

In *Karr Supply Co. v. Kroenig*, 167 Ill. 560, it is said: "Defendant, in furnishing help, was not bound to act upon the assumption that its servants would undertake, without any direction as to how the work should be done, to lower the tank by the most inconvenient and hazardous method. It had a right to assume they would use a reasonable and proper method when left to make their own selection."

Appellants had a right to assume that appellee and Morse would use reasonable and proper precautions, or at least, keep out of its way, if the timber was not blocked. As is said in the case last quoted, "There was no evidence whatever tending to prove that defendant knew, or ought to have known, any more about the number of men required, or the necessary appliances, than the plaintiff." The rule is long established, and by this time should be well known, that "the relation of master and servant implies no obligation on the master to take more care of the servant than the servant is willing to take of himself." *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *Karr Supply Co. v. Kroenig*, 167 Ill. 560.

The record contains nearly a thousand pages, and there are thirty-five assignments of error. We have not undertaken to review all these alleged errors at length, or discuss all the points made in the respective briefs.

The evidence fails to sustain the declaration, and shows a state of facts such as to preclude recovery against

appellants. No negligence of theirs contributing to the alleged injury has been shown. It is our duty to put an end to useless litigation, and the judgment of the Superior Court is accordingly reversed without remanding. Reversed.

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United States Express Co. v. People ex rel. Western Wheel Works.

1. **REVENUE STAMP**—*To be Affixed to Receipts by the Carrier.*—Under the Act of Congress to provide ways and means to meet war expenditures, etc., approved June 13, 1898, it is the duty of common carriers, upon receiving packages for transportation, to issue receipts and bills of lading therefor and to affix thereto, without demanding or receiving from the shipper, the revenue stamp required by such act.

2. **SAME**—*To be Affixed by the Carrier.*—The revenue stamps upon receipts and bills of lading issued by express companies upon receipt of packages and parcels for transportation, are to be affixed by the companies and not by the shipper.

3. **COMMON CARRIERS**—*Right to Revise Charges.*—When the increased cost of handling and transportation demand it, a common carrier has the right to revise and increase his rates; but he can not arbitrarily do so in order to make his customers or the public pay a tax imposed by law upon him or upon the business transacted by him.

4. **SAME**—*Requiring the Shipper to Pay for the Stamp not a Revision of Rates.*—A rule of an express company requiring shippers, in addition to its former rates, to pay the stamp tax upon its receipts and bills of lading, is not a revision or increase of rates, because it adds to the former rate the same amount in each transaction.

5. **STAMP TAX**—*Necessarily Arbitrary.*—The stamp tax is necessarily an arbitrary one. It may be imposed by the government without regard to value or the amount of the transaction or the cost or expense attending it.

Mandamus, to compel an express company to receipt for carriage and transportation of packages. Trial in the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Hearing and decree for relator; appeal by respondent. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed March 14, 1899.

U. S. Express Co. v. People.

WILLARD & EVANS, attorneys for appellant; **LAWRENCE MAXWELL, JR.**, of counsel.

Even if the act in terms imposes the tax upon the express company, the latter may, nevertheless, lawfully require its reimbursement as a condition of accepting goods for transportation. *Jones v. Van Benthuyzen*, 103 U. S. 87, 88; *Seligman's Essays on Taxation*, p. 204; *Pomeroy's Constitutional Law*, p. 230; *John Stuart Mills' Principles of Political Economy*, Vol. 2, p. 415; *Gregg v. Sanford*, 65 Fed. Rep. 151, 154 (C. C. A.); *Platt v. Colvin*, 50 Ohio St. 703.

The act does not impose the tax upon the express company or its business, but merely upon the transaction of shipment, and in terms provides that it may be paid by either party to the transaction. Act of Congress of June 13, 1898, C. 448, 30 Stat., pp. 451-459; *Congressional Record*, Vol. 31, p. 5627.

The writ of mandamus will not be awarded in any case unless the relator shows a clear legal right. It will never be granted in a case doubtful either as to law or fact; and this rule is not changed by the Illinois statute on mandamus.

Questions involving reasonableness of rate can not be determined in this action. *Nebraska Tel. Co. v. State*, 76 N. W. Rep. 171.

MORAN, KRAUS & MAYER, attorneys for appellee.

The duty of affixing and canceling the stamp, and the liability to the penalty for failing to do so, are clearly and expressly imposed on the express company.

In construing the act of 1866, Commissioner of Internal Revenue Rollins said:

It is the duty of the maker of an instrument to affix the stamp thereto, and to cancel the same in the manner required by law. (4 Int. Rev. Rec., p. 61; 4 Int. Rev. Rec. p. 164.)

That the execution of the receipt includes, as a necessary act to execution, the affixing and cancellation of the stamp,

appears from the opinion of the Supreme Court in *Latham v. Smith*, 45 Ill. 25, 26.

Speaking of the stamp, the court says:

"If necessary, the note was as incomplete (without the stamp) as if it had lacked the maker's signature, and the attaching and canceling it, without authority, would be as unauthorized as writing the maker's name to the instrument without authority. If that is important, it is the last act essential to its validity and is as much the act of the maker as is the signature." *Myers v. Smith*, 48 Barb. (N. Y.) 614.

When the legislature puts a construction on an act, a subsequent cognate enactment in the same terms will, *prima facie*, be understood in the same sense. Endlich on Interpretation of Statutes, Sec. 365; Black on Interpretation of Laws, 161.

The common law liability of an express company does not rest in contract, but is imposed upon it by the law. Hence, when goods are offered the company for transportation, it must receive them on being paid or tendered the reasonable rates for carriage. *Kirby v. Adams Ex. Co.*, 2 Mo. App. 369; *So. Ex. Co. v. Moon*, 39 Miss. 822; *U. S. Ex. Co. v. Hutchins*, 67 Ill. 348; *Pacific Ex. Co. v. Shearer*, 160 Ill. 215; *Buckland v. Adams Ex. Co.*, 97 Mass. 124; *Bank of Kentucky v. Adams Ex. Co.*, 93 U. S. 174.

PER CURIAM.

This appeal is from an order of the Circuit Court directing that a peremptory writ of mandamus issue to the United States Express Company, a carrier, commanding it to receive for carriage and transportation the specific package or parcel mentioned in the petition for the writ, and all other packages or parcels that the relator may, from time to time, tender to said company for carriage and transportation in the usual course of its business as a carrier, provided the relator shall tender payment to said company of its regular, usual and reasonable transportation charges therefor, without demanding or receiving from the relator the revenue stamp, or payment of the value thereof required by the act of Congress to provide ways and means to meet

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war expenditures, etc., approved June 13, 1898, to be affixed to bills of lading or receipts issued by said company.

The real object of the proceeding, and the specific issue involved is, who is to pay the tax of the cost of the stamp—the carrier or the shipper?

And that question does not in any manner involve the right of the shipper and carrier to bargain as they may please in reference to casting the burden of the tax upon one or the other, concerning which power and right to contract there could hardly be a question, and with which the United States has no direct concern. It is only as to which of the two shall bear it when they do not agree.

The act of Congress does not affect the common law duty and right of carrier and shipper, as between themselves. It simply superadds to the unaltered common law duty of the carrier to receive and carry, the requirement that it shall issue a receipt or bill of lading for whatever package or parcel it does receive to carry, and that such receipt shall have affixed to it a revenue stamp of the value of one cent. By every rule of construction and inference, the duty to furnish and pay for the stamp required to be put upon the receipt, which must, under the law, be issued, devolves upon the carrier, who is required to issue it. The carrier must issue the receipt; it can not issue it unless stamped, without subjecting itself to a penalty many times in excess of the value of the stamp. It is for the carrier's benefit that the stamp must be affixed and canceled, for without the stamp it can not do business. The shipper's rights under the law are not dependent upon the issuance of a receipt to him. As to him it imposes no burdens and gives no rights, and is not even necessary as evidence; it is a mere convenience as to him.

And, besides, it is manifest from the whole act and the purposes it was enacted to aid in accomplishing, that the legislative intent in enacting it was to place a tax upon the business of the carrier, and this the carrier should not be permitted to avoid by forcing its share of lawful burden upon an unwilling shipper.

In order to speed the cause, we refer to the opinion of Judge Tuley delivered when the case was before the Circuit Court, which shows in detail most of the main features of the case that govern our decision, omitted in what we have said. In addition to that opinion, we refer to the case of the Attorney General ex rel. v. American Express Co., decided by the Supreme Court of Michigan, December 6, 1898 (77 N. W. Rep. 317).

Judge Tuley's opinion is as follows:

"The relator in this case, the Western Wheel Works, an Illinois corporation, engaged in business in Chicago, was in the habit of shipping by the defendant, the United States Express Company, a large number of packages daily, sometimes amounting to between one and two hundred a day.

About the 8th of June, 1898, and after the passage of the act of Congress known as the 'War Revenue Act,' it took a package to the office of the express company for shipment to a point called Pine Bluff, in the State of Arkansas. The rate charged by the express company had been, as appears by the evidence, forty-five cents for a package of that character for the last six or eight years. When the package was tendered to the company, the evidence shows that the agent started to fill out a blank bill of lading or receipt for the shipment, and, observing that the party making the shipment counted out forty-five cents to pay the charges, the agent demanded that he should pay in addition one cent of a revenue stamp to be attached to the bill of lading, and upon his refusal to do so, the company, by its agent, refused to accept the parcel for transportation.

There is some little difference in the evidence as to what occurred at the time of the presentation of the package, but there is no doubt of this fact, that the agent refused to receive the package unless the one cent for the revenue stamp was paid in addition to the forty-five cents, which is the material fact in the case.

Thereupon this petition in the name of the people on relation of the Western Wheel Works, was filed.

The company filed an answer denying in general all the allegations in the petition.

The question involved in this case is upon whom, under the act of Congress, is the obligation imposed to pay the stamp tax—the express company or the shipper.

That depends, first, upon the construction to be placed primarily upon the portion of the stamp act referring to

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and headed 'Express and Freight,' taken, of course, in connection with all other relative provisions of the act of Congress.

The section refers to express companies, railroad corporations, persons, etc., engaged in the business of carriers for hire, and requires them to issue bills of lading, etc., or other evidence of the receipt of the property for each shipment received. It is conceded that the language is sufficiently broad to cover express company receipts, which are, in fact, nothing more than bills of lading. The section as applicable to express companies, eliminating what refers to other companies, would read as follows: 'It shall be the duty of every express company * * * to issue to the shipper * * * or person from whom any goods are accepted for transportation, a bill of lading * * * for each shipment received for carriage or transportation * * * and there shall be duly attached and canceled as in this act provided to each of said bills of lading * * * a stamp of the value of one cent. * * * Any failure to issue such bills of lading * * * as herein provided shall subject the express company * * * to a penalty of fifty dollars for each offense, and no such bill of lading * * * shall be used in evidence unless it shall be duly stamped as aforesaid.'

The act of Congress referred to is entitled: 'An Act to provide ways and means to meet war expenditures and for other purposes.'

It aims to raise revenue to meet war expenditures by taxation.

The Supreme Court of the United States, in what is called the Foreign Bond case, 15th Wallace, uses this language in regard to the subject-matter of taxation: 'The subjects of taxation are persons, property and business. Whatever form taxation may assume, whether as duties, imports, excises or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though, as applied to them, the taxation may be exercised in a variety of ways.'

The subjects of taxation referred to in the act, among others, are the railroad companies, express companies, and other common carriers, steamboats, etc., telephone, life insurance and various other business and occupations.

It was not the intent to tax the corporation or person engaged in the express business. It was not intended to tax the property or capital stock employed by such corporation or person in such business. It must, therefore, be the

business of the corporation or person engaged in the occupation of a common carrier which the law intends to tax. The business is taxed, not on its receipts, nor according to its extent, but by levying and collecting a tax for and in respect of instruments (bills of lading, receipts, etc.) mentioned in Schedule A, or for, and in respect of, the vellum, parchment or paper upon which such instruments shall be written or printed. (See section 6.)

That is to say, the act is an exercise of the power to tax the business of the express company by way of or by means of imposing a stamp tax on its bills of lading or receipts, which it is compelled to use in the transaction of its business.

How has the law-making power exercised its taxing power, and has it done so in a manner clear and free of any reasonable doubt?

The section quoted, headed 'Express and Freight,' makes it the duty of the express company to issue with each shipment or package received a bill of lading (or receipt—I use them interchangeably).

What is meant by 'duty'? The meaning in law is 'that which a person is bound by any legal obligation to pay, do, or perform.'

The express company is put under a legal obligation to do what? To issue a bill of lading.

What is it 'to issue'? To 'issue' is to send out, to send forth, as to issue an order of a commanding officer, or to issue a writ or precept of the court.

The bill of lading or receipt must be set forth, parted with, or, in other words, issued by the express company.

Must be issued to whom? The law is clear, to the shipper, consignor, agent or person from whom the goods are accepted for transportation.

But what kind of a bill of lading is the express company under legal obligation to so issue to the shipper?

It would be an absurd conclusion to say that the company is required to issue to the shipper an unstamped bill of lading or receipt, the issuing of which is made a penal offense by section 7 of the act.

It was not the intent of the statute to place the express company under an obligation to do an illegal act. The bill of lading, or receipt that the express company is to issue, must be a complete bill of lading, a legal instrument, and this can only be a stamped instrument. This is the clear intent of the section, because it not only requires the express company to issue a bill of lading, but proceeds, 'and there

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shall be duly attached and canceled as in this act provided, to each of said bills of lading * * * a stamp of the value of one cent. * * * Any failure to issue such bill of lading * * * as herein provided, shall subject the railroad, express companies, etc., to a penalty of fifty dollars.'

The penalty is imposed for a failure to issue a bill of lading with the stamp attached.

The word 'such' qualifies all that goes before in connection with the bill of lading, and must by all rules of construction be held to mean a bill of lading with the stamp attached.

It is contended that the section quoted does not expressly state that the express company shall attach and cancel the stamp. It is, however, a necessary inference that it shall do so. It is made its duty to issue the bill of lading; it can only issue a legal bill of lading, and that is one duly stamped. The shipper has nothing to do with the issuing, the sending forth the bill of lading. The stamp must not only be affixed, but must be 'canceled,' as in the act provided.

Section 9 of the act provides that where an adhesive stamp shall be used for denoting the tax imposed by the act, the person using or affixing the same shall cancel the stamp in a certain manner therein specified.

If the duty of the express company is to issue a complete—a legal—bill of lading, it must be one with the stamp affixed and canceled; and the company can only fulfill that duty by so affixing and canceling the stamp. This would appear to be a necessary inference from the duty imposed by the act.

It is contended that this construction put upon the words 'such bill of lading,' if applied to the same words in the next following provision, prohibiting the reception by the courts of 'such bills of lading' as evidence, unless duly stamped, would make the law mean that no stamped bill of lading should be received as evidence. Such a construction could not be made, as it is opposed to the very spirit and intent of the act. A court is not disposed to be hypercritical as to the use of words by the legislative body, if it can discover the purpose and intent of the legislature, and, if necessary, it will, in construing the act, reject as surplusage a word that is inadvertently used.

Congress has no power to prescribe to courts what they shall or shall not receive as evidence. That is so held in case of *Craig v. Dimock*, 47 Ill. 308. Although Congress

has no power to prescribe to courts what they shall or shall not receive as evidence, the court would not construe the act as an attempt by Congress to dictate to the court what it should or should not receive in evidence, but will construe the sentence referred to, as intended to provide a further method of enforcing the payment of the stamp, and will, undoubtedly, aid the legislative power in the collection of its revenue, by refusing to receive in evidence such instrument not stamped, or at least until the stamps shall have been first affixed.

There is some language in section 6 of the act which is relied upon to show that the tax may be paid, either by the express company or by the shipper. The section provides 'that there shall be levied, collected and paid for and in respect of the bonds, instruments, etc., matters and things mentioned and described in Schedule A of this act and for or in respect of the vellum, parchment or paper upon which said instrument, matters or things, or any of them, shall be written or printed—by any person or persons, or parties who shall make, sign or issue the same, or for whose use and benefit the same shall be made, signed and issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule.'

These are general words applicable to all the numerous documents, instruments, businesses, etc., enumerated in Schedule A.

The words, 'for whose use or benefit the bill of lading shall be made, signed or issued,' may be held to apply in principle where the transaction (or the making of the receipt) is done by an agent or broker; but there are matters specified in Schedule A, where it is clearly intended that the party for whose use or benefit the bill of lading is made shall pay the tax, as, for instance, where entries are made of goods at the custom house and a receipt or certificate is given therefor, and also entries for the withdrawal of goods or merchandise from a customs bonded warehouse and a receipt or certificate is therefor given. But such general language used to designate all persons or classes of persons who may, under any provision of the act, be required to pay the stamp tax, will not be allowed to cast any doubt upon the express provision of the act requiring the express company to issue a receipt to the shipper.

It is, however, contended by the defense, that a common carrier may stipulate as to the terms of his contract, and that the court can not prescribe the terms or price of transporta-

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tion by the carrier; that in demanding the payment of the tax as an addition to the fixed rate it has only exercised its right to make and fix reasonable rates.

It must be admitted that when the increased cost of handling and transportation demand it, a common carrier has the right to revise and increase his rate, but he can not arbitrarily do so in order to make his customers or the public pay a tax imposed by law on such a carrier or upon the business transacted by him.

The real contention between the shipper and the express company is as to who shall pay this tax, and the express company is endeavoring to make the shipper pay it.

The evidence shows that after the passage of the act and before it went into effect, to wit, on June 29th, the company's general agent issued a certain circular to all shippers of fruit and produce, etc., informing them of the going into effect of the new law on July 1, 1898, and stating that it requires the company to see that a revenue stamp of one cent is affixed to each express receipt issued; that the company will decline to receive any shipments offered to go by express unless they are entered upon the express receipts used by the company and a one cent revenue stamp affixed to each receipt. 'Shippers will be expected to pay to the company one cent for each receipt issued.'

A letter of instructions by the general agent was also issued about the 29th of June, with reference to the same matter. 'A receipt must be given for all express matter.' it states 'and stamps must be canceled with the letters "U. S. X.," and date in ink, indelible pencil or rubber stamp by the party signing the receipt; the value of the stamp must be collected from the party to whom the receipt is given.'

'Canceling stamps will be furnished.' 'Receipts for deadhead matter require a one cent stamp, which must be collected of shipper.'

On July 1st, from the home office at New York, a general circular to all the agencies was issued in regard to the same matter, in which they are informed that a receipt must be issued 'for each and every shipment of goods accepted for transportation over this company's lines.' 'To every receipt and duplicate thereof for a shipment of goods within the United States there must be affixed a United States revenue stamp of the value of one cent.' 'The stamp, after being affixed, must be canceled by writing or stamping thereon with ink or with indelible pencil the initials "U. S. X." and the date of the receipt.' 'In every case the amount of stamps must be collected from the party to whom the receipt is issued.'

‘Quotation of rates, etc. On and after July 1, 1898, all rates quoted must be “plus the government stamp tax.”’

It is apparent, therefore, that in demanding this tax of the shippers, the express company has made no revision of its rates, nor, in fact, fixed any increased rate, and that there is simply an effort of the express company to make the shipper pay the tax, levied, as I have stated, upon the business transactions of the company, by the agency or means of a stamp tax upon the bills of lading which the company is required to issue.

It is not a revised increase of rate, because it adds to the former rate the same amount in each case or transaction.

The rate or charge as fixed heretofore by the company must necessarily give a larger profit in some cases than in others, and the cost of handling and transportation be greater in some than in others. It would, therefore, follow that in some cases the old rate for transportation might be a reasonable one, and might yield a reasonable profit, even if the express company should be obliged to pay this stamp tax.

The express company is a common carrier; is carrying on a business affected with a public interest. It can not arbitrarily fix its own rates or make such a contract with each shipper as it pleases. It must treat all alike and must carry for all at a reasonable rate or charge. The power to revise its rates and fix a reasonable charge or rate does not authorize it to arbitrarily increase all its rates by a horizontal increase thereof without regard to whether such increase leaves a rate, as to any particular shipment, a reasonable or unreasonable one.

The stamp tax is necessarily an arbitrary one. It may be imposed by the government without regard to value or the amount of the transaction or the cost or expense attending the transaction.

The tax is the same on a receipt for a parcel that may be delivered by hand within a block or two as it is on a receipt for a package that has to be several times handled and carried thousands of miles by the express company.

The express company has not the power of the national government, and can not in a like arbitrary manner add to its rate for performing its duties as a common carrier.

If it is an increase of rate, this is what it has attempted to do; but as before stated, it is not, in fact, a revision or increase of rates, but it is an arbitrary attempt of the company to make the shipper pay a tax, which the law requires the company to pay. The court must regard the substance of the contention and not the pretense.

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I remember as a matter of personal recollection, that at the time of the going into effect of the stamp act during the war of the rebellion, the express companies endeavored at that time to make the shipper pay the stamp tax, and the shipper did for a short time pay it, but it was soon changed and the company paid it, whether in pursuance of any decision or in pursuance of a ruling at Washington, I do not know. I have not been able to find any decision upon the question.

I also recollect that the street railway companies attempted to add one cent to the fare, but did not persevere in their attempt a great while.

The defendant raises a constitutional question, and that is, that if the act does require the defendant to pay for the stamp, it imposes a direct tax in contravention of the Constitution of the United States, within the meaning of the income tax decision of the Supreme Court of the United States.

I shall not pass upon that question, as it was not argued before me. At first glance I see nothing in the contention as to the unconstitutionality of the act.

Stamp acts went into effect, I believe, in England, during the time of William and Mary; they are a recognized method or means of taxation in all countries.

The stamp act was in force for a number of years during the war, and no decision is pointed out which at all intimates that it is unconstitutional.

At first glance, I think there is nothing in the contention, but I will not pass upon it directly.

The relator contends that he is entitled to a continuing mandamus, while the defendant contends that the relief must be confined to the single transaction or shipment mentioned in the petition.

The relator is engaged in a business which requires it to send by express about two hundred parcels a day. To require that it shall seek a mandamus as to each shipment, would be a travesty upon the administration of justice. Such a rule would leave the weak, that is, the shipper, at the mercy of the strong.

A more reasonable rule, and the rule contended for by the relator, prevails in this State.

I have not had time to look up the authorities, but I remember the case of *Nelson v. The Chicago & Alton Railroad Company*, so decides.

See, also, *C. & N. W. Railway Company v. People*, 56 Ill. 365, and *Vincent v. Chicago & Alton*, 49 Ill. 33.

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Let the writ of mandamus issue as to the shipment mentioned in the petition and as to all future shipments tendered by the relator."

It only remains for us to order that the judgment of the Circuit Court be affirmed.

80	458
184	625

Francis B. Peabody, Receiver, etc., v. New England Water Works Company et al., Consolidated with Francis B. Peabody, Receiver, etc., v. United Water Works Company.

1. **RECEIVERS—*Power to Prosecute Actions.***—In general, a receiver, before he can sue, must show that authority has been conferred upon him, as receiver, to prosecute the action, by the court appointing him, and, failing to show this, he can not maintain it.

2. **SAME—*Are the Creation of the Court.***—A receiver is the creation of a court of equity, and has such powers as are conferred upon him by the order appointing him and the practice of the court.

3. **SAME—*Powers Under the Statute.***—The ordinary chancery receiver has power to sue, as a general rule, only when authorized by the court appointing him, and the statute gives him the right to sue only when he is commanded by the court. He has no right to appear in a suit at law without the authority of the court appointing him.

Motion to Vacate Judgment.—Heard in the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Motion denied; appeal by the movers. Heard in this court at the October term, 1898. Appeal dismissed. Mr. Justice SEARS dissenting. Opinion filed March 16, 1899.

RUNNELLS & BURRY, attorneys for appellant.

OTIS H. WALDO, attorney for the New England and United Water Works Company; WILSON, MOORE & McILVAINE, attorneys for the American Water Works Company.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

These cases were, by stipulation, submitted for hearing upon the same abstracts and briefs in each case, the ques-

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tion for decision being the same in each case, viz.: Whether the appellant receiver had any such standing in the Circuit Court that his motion to set aside the judgments in favor of the respective appellees should have been entertained by that court. If he had no rights in that court to be heard, as against these appellees, he has no such right in this court.

Appellant was, May 1, 1895, appointed receiver of the American Water Works Company of Illinois, in a proceeding under section 25 of the corporation act, to wind it up, begun in the Circuit Court.

April 10, 1897, each of the appellees began suits in assumpsit in the same court, on the law side, against the corporation. It, on the same day, entered its appearance, waived a jury, and practically consented to judgments in favor of the appellees, in favor of the New England Works Company of \$242,795.50, and in favor of the United Water Works Company of \$6,188.62.

April 17, 1897, and during the same term, the receiver, appellant here, entered a motion in each of the law cases, to vacate the judgment, for leave to plead and to make defense on behalf of the corporation in his name, as receiver, or otherwise, which was denied. On the hearing of these motions, the receiver presented affidavits tending to show, and for the purpose of this decision it may be conceded, did show, a good defense to each of the suits, in part, at least, that the judgments were unjust as against the insolvent corporation, and that they were entered by collusion between the appellees and the officers of the defendant corporation.

It is unnecessary, in the view we take of this case, to consider the details relating to this showing or the showing made by the counter affidavits, which were admitted by the court against the objection of appellant, or whether it was proper for the court to allow the counter affidavits. Section 25 of the corporation act, in so far as material here, provides, viz.: "And courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor, who shall have authority, by the name of the receiver of such corpo-

ration (giving the name), to sue in all courts and do all things necessary to closing up its affairs as commanded by the decree of such court."

The order appointing the receiver, after authorizing and directing him to take possession of the property, assets, books of account, etc., of the corporation, to file an inventory and to manage and control the property under the orders of the court, orders that he have, in the management and control of said property, the usual powers of receivers in like cases, and proceeds, viz.:

"It is further ordered, adjudged and decreed that any and all officers, agents, attorneys, servants and employes of said defendant, and any and all parties having in their possession or under their control any of the property or assets of said defendants, immediately surrender all such property and assets to the receiver hereinbefore named, and that they and each and all of them refrain from in any manner intermeddling with said property or withholding possession thereof from such receiver; and they and each of them are hereby enjoined from any and all attempts to withhold or conceal any of said property from said receiver, and from contracting any liabilities in the name or on behalf of said defendant, Illinois corporation, or of using its name for any purpose or in any proceedings; and all parties having any claims against said defendant Illinois corporation are hereby directed to present the same in this proceeding for adjudication."

It contains no authority to sue or defend suits, nor to do anything except as above stated.

It is contended that appellant is a statutory receiver, and by virtue of his appointment, had the right, under section twenty-five of the corporation act, to defend suits in the name of the corporation, and that the order appointing the receiver forbade all persons from using the corporate name and consenting to judgments against it, and that the court should have set aside the judgments in vindication of its injunction, and that appellant has made a good showing upon the merits why the judgments should be set aside.

In general, a receiver, before he may sue, must "show that by the appointment of the court, properly made, in a matter within its jurisdiction, authority has been con-

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ferred upon him, in his representative capacity as receiver, to prosecute the action; and failing to show this, he can not maintain an action." High on Receivers, Secs. 201 and 208; Beach on Receivers, Sec. 650; Coope v. Bowles, 28 How. Pr. 11; Davis v. Ladoga Creamery Co., 128 Ind. 222, and cases cited; Republic Life Ins. Co. v. Swigert, 135 Ill. 150, 176.

We are aware this court (Burch v. West, 33 Ill. App. 360) entertained an appeal by a receiver from a decree adverse to him in a bill filed by him attacking certain judgments rendered before his appointment, against the insolvent corporation of which he was receiver, but his right as receiver to file the bill and take the appeal does not seem to have been questioned. Relief was denied him for the reason that the insolvent company could have been granted no relief against the judgments, which was affirmed on appeal to the Supreme Court. (134 Ill. 267.) Also, that in Hanke v. Blattner, 34 Ill. App. 394, 4th District, it was held that by virtue of said section 25 a receiver might sue without an order by the court appointing him authorizing him to bring suit. Also, that in some jurisdictions, it has been held that the receiver is the representative of the creditors, as well as the corporation, and may sue and defend in the name of the corporation, without express authority of the court. Gluck & Becker on Receivers, 175-8; Rust v. Amer. Water Works Co., 70 Fed. Rep. 129; Bosworth v. Terminal R. Ass'n, 80 Id. 971.

In most, if not all of these cases, last cited, outside the Federal courts, it will be found that the right of the receiver to sue depends upon some special statute.

In the Swigart case, *supra*, the court say: "A receiver is the right hand and creature of the court of equity, and has such powers as are conferred upon him by the order appointing him, and the course and practice of the court;" but held that a receiver appointed under the statute authorizing the State Auditor to wind up the business of insolvent insurance companies, and which gave to such receivers the "power to prosecute and defend suits in the name of the corporation, or in their own names, to appoint agents under

them, and do all other acts necessary for the collection, marshaling and distributing of the assets of the company and the closing up of its concerns," had no right, by suit in his name, to impeach a transaction which the corporation could not challenge, in that case, to sue shareholders to collect their subscriptions to capital stock of the company, which the company had, by contract, put it out of its power to collect, and generally, that the receiver had no power not given him by the statute nor by the order of the court.

Section 25 gives the receiver appointed under that section authority to sue only in the name of the receiver of such corporation, "as commanded by the decree of such court."

As we have seen, the ordinary chancery receiver has power to sue, as a general rule, only by authority of the court appointing him, and this statute only gives him the right to sue when he is commanded by the court. We hold that he had no right to appear, in the suits at law, without the authority of the court appointing him, which is not shown by this record, and therefore no right to prosecute the appeals in this court. It would be a precedent calculated to encourage litigation at the expense of insolvent estates for the benefit of receivers and their attorneys, who might be inclined to profit by such litigation, to hold that a receiver, without the authority of the statute or the order of the court appointing him, might of his own will defend suits brought against the corporation. He should be and is at all times the servant of the court, and should look to it for his authority, unless the legislature, in its wisdom, sees fit to vest him with greater power, which we think has not been done by said section 25. It can make no difference in this case, that the receiver was appointed and the judgments entered by the Circuit Court. There are many branches of the Circuit Court in Cook county. There is nothing to show in this record that the same judge appointed the receiver, entered the judgments and refused appellant's motions. Even if that did appear, we may infer (if it were not stated by appellant's counsel in their brief), that the judge deemed it wise to deny the receiver the

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right he claims because he had no standing to represent the corporation, and also that he thought it best to leave such litigation to the creditors of the defunct corporation, who have an undoubted right, in their own behalf and at their own expense, to attack fraudulent judgments. Each of the appeals is dismissed.

MR. JUSTICE SEARS, dissenting.

If the judgments obtained against the corporation are conceded to have been for amounts not due to the pretended creditors, and the corporation was itself restrained by the order of the court appointing the receiver, from defending in those suits, then it would seem clear that the receiver would have the right, and it would be his duty to interpose any defense which the corporation might have made but for the injunction. *Burch v. West*, 33 Ill. App. 359, approved in 134 Ill. 258.

And the receiver might appear and move the court to vacate the judgments, as has been held an assignee might. *Knights v. Martin*, 155 Ill. 486.

Nor do I concur in the construction of section 25 of the corporation act, which would make it essential that the receiver first be "commanded by the decree" of the court appointing him before he could appear and interpose such motion.

If the words "as commanded by the decree of such court" be related to the bringing of suits, then a mere order granting permission to sue would be insufficient, and a direction or command by decree of the court would be made necessary by the statute, which would thus operate to restrict such powers of the receiver, as he would have in case of a general chancery receivership. If the words relate to the decree of the court "closing up its affairs," the operation of the statute would seem more reasonable. The latter interpretation has been heretofore put upon this provision by this court. *Hanke v. Blattner*, 34 Ill. App. 394.

Frank Musial v. Kosciuszko Building & Loan Association.

1. **BUILDING AND LOAN ASSOCIATIONS—*Judgments in Favor of Withdrawing Stockholders.***—The collection of a judgment against a building and loan association in favor of a withdrawing stockholder may be controlled by a court of equity, and may be stayed permanently where it turns out that the association was insolvent at the time of withdrawal, because such a stockholder is not entitled to priority of payment over his fellow stockholders.

2. **SAME—*When the Association May Invoke the Aid of a Court of Equity.***—The attempt to collect such a judgment against a building and loan association by levy and sale is an injury to the body corporate as well as to the stockholders, and the corporation may invoke the protection of a court of equity.

3. **SAME—*Are Trustees for the Stockholders.***—A building and loan association is the trustee and representative of all its stockholders, and is bound to protect them against withdrawing members seeking a priority to which they are not entitled.

4. **SAME—*Withdrawing Members—Not Required to Show Solvency.***—As the solvency of the association is not required, under the statute, to be proved by the plaintiff suing at law as a withdrawing member, in order to make out a *prima facie* case, it is not the duty of the association to interpose the defense of insolvency at least unless it appears that such insolvency not only existed but was then known or should have been known to exist by the association and its officers.

5. **PARTIES—*In Equity Proceedings.***—It is an elementary rule that in equity proceedings all persons whose rights may be injuriously affected by the proposed decree are to be made parties.

6. **RES ADJUDICATA—*As to Insolvency.***—A judgment at law against a building and loan association establishes no presumption "*res adjudicata*" in respect to the solvency of such association.

Appeal from an Interlocutory Order granting an injunction. Entered by the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Mr. Justice HORTON not concurring. Opinion filed November 18, 1898. Rehearing denied February 27, 1899.

This is an appeal from an interlocutory order granting an injunction.

The bill avers that appellant brought a suit at law as a withdrawing member of the association, under a notice of withdrawal said to have been served in April, 1897, and recovered judgment; that the first execution was returned

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unsatisfied and an alias placed in the hands of the sheriff to restrain the levy of which the bill is exhibited.

The bill further states that the association was insolvent on the 11th day of April, 1897, the date when notice of withdrawal is alleged to have been served, and had been so insolvent continuously for a year prior thereto; that January 18, 1898, being so insolvent and unable to transact business, a general meeting of stockholders was held, and it was then and there determined to go into voluntary liquidation, pursuant to the statute, and distribute the assets among the members; that pursuant to such resolution, trustees have been appointed by complainant, who have not qualified, although about to do so.

It is stated that appellant, by reason of such insolvency of the association at the time of the alleged service of notice of withdrawal and since, is only entitled to his *pro rata* share or percentage of the assets in payment of his claim, which will be less than its amount. The bill prays that appellant be allowed his just proportion only of the assets, and for an injunction to restrain levy of appellant's execution. A demurrer was filed.

MOSES, ROSENTHAL & KENNEDY, attorneys for appellant.

JULIUS F. SMJETANKA and J. WARREN PEASE, attorneys for appellee.

Judgment being obtained against a building association, it does not, however, necessarily follow that execution may issue at once. The fact that the claimant has obtained judgment ascertaining the amount of his claim does not alter the character of the same nor the character in which he holds it. Endlich on Building Associations, Par. 110.

But the court has the power, and the building association has the right to invoke that power, of restraining immediate issuing of execution against the building associations for the collections of the judgment, when proper equities are shown by the society, either temporarily, in order to give it a reasonable time to make up the money without

undue embarrassment of its affairs, or permanently, where it turns out that the association was insolvent at the time of actual withdrawal. Endlich on Building Associations, Par. 112.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

An injunction was granted restraining the levy of the execution, according to the prayer of the bill. Appellant seeks to set aside this order, and urges as ground for reversal that the matters sought to be adjudicated by the bill were determined against the association in the action at law when judgment was recovered, and that the association was negligent in not setting up its defense then; that the association has been guilty of *laches*, and that it is not the proper party to maintain the bill.

The statute provides that any member may withdraw the dues paid on his shares of stock, provided "that at no time shall more than one-half of the funds in the treasury of the association be applicable to the demands of withdrawing members or the payment of matured shares without the consent of the board of directors."

It has been held that the withdrawing member can not maintain his action until funds are in the treasury applicable to the payment of the claim. *Englehardt v. Fifth Ward Loan Association*, 148 N. Y. 281; *Heinbokel v. National Savings, Loan & Bldg. Ass'n*, 58 Minn. 340.

In the last mentioned case the court states the question thus: "Can a non-borrowing member of a mutual building association, who has brought himself within the rules by notice of withdrawal, be permitted to bring an action and take judgment against the association, when, by reason of the statute and the by-laws, there is no money in the treasury legally applicable to the payment of his claim?" And it is said that "until there is money available for the purpose, no cause of action exists;" that a withdrawing stockholder "can not properly be regarded as having the rights of the ordinary creditor."

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Appellant contends that proof of the existence of the facts required by the statutory proviso is a necessary prerequisite to recovery by the plaintiff; that it must therefore be presumed, when a judgment is rendered against an association in favor of a withdrawing member, that such facts were alleged and proved, and the court found accordingly in rendering judgment; and, hence, the judgment is entitled to preference.

But in this State the requirements of the statute are, notice of intention to withdraw, and funds in the treasury, half of which can be thus applied. The bill in this case alleges that the association was insolvent at the time of the notice of withdrawal and has been ever since. We agree with appellee that the solvency of the association is not required to be proved in the first instance, under the statute, by the plaintiff suing to recover as a withdrawing member in a suit at law, and the judgment establishes no presumption in this respect.

It has been expressly held in this State that "though judgments may be obtained against the association by members upon notice of intention to withdraw, yet the collection of such judgments may be controlled by courts of equity. Upon this point it is said in *Endlich on Building Associations*, Sec. 112: 'The execution may be stayed temporarily if proper equities are shown, or permanently where it turns out the association was insolvent at the time of the actual withdrawal.'" *Chapman v. Young*, 65 Ill. App. 131.

The association in the present case appears, from the bill, to have been thus insolvent at the time of the withdrawal, and, according to the authority last referred to, the execution against it may be permanently stayed.

In *Gibson v. Safety Homestead Association*, 170 Ill. 44, it is said that "notice of withdrawal from an insolvent society does not entitle members to priority of payment over their fellow stockholders."

It is contended, however, that the association can not avail itself of these equities and invoke the aid of the court to enforce them; that the stockholders themselves are the proper parties to complain, if any one may.

In Endlich on Building Associations, Sec. 138, page 176, it is said :

“But the court has the power, and the building association has the right to invoke that power, of restraining the immediate issuing of execution against the building association for the collection of the judgment, when proper equities are shown by the society, in order to give it a reasonable time to make up the money without undue embarrassment of its affairs.”

In the present case the bill is presented in the name of the corporation, and it states that trustees have been appointed pursuant to law, who had not yet qualified (Rev. Stat., Chap. 32, Sec. 91 M). Such trustees are designated in the next section of the statute (91 N) as a “special committee,” appointed by the stockholders for carrying out the resolution providing for voluntary liquidation, and it seems to be supposed that the bill should have been brought by them when qualified. If we concede this for the sake of the argument, yet the delay for the trustees to qualify might have enabled the mischief to be done which the bill seeks to prevent.

In Hersey v. Veazie, 24 Maine, 9, a case where a bill was brought by certain stockholders to recover against an agent of the corporation, it is said :

“The court could not rightfully assume the control of the corporation and exercise its rights in this respect without its being a party to the suit, and having an opportunity to justify its own course of proceeding. * * * And until it has been shown to have been incapable of doing it, or to have been faulty, no corporator can assume its right to obtain redress for such wrongs, and to settle for them with the person who has committed them.”

In Angell & Ames on Corporations, Sec. 370, it is said :

“It is indeed now, as it has ever been, perfectly well established that corporations, whether public or private, may commence and prosecute all actions upon all promises and obligations, implied as well as expressed, made to them, which fall within the scope of their design, and the authority conferred upon them. The suit must generally be brought in the corporate name. * * * It is equally well settled that corporations may sustain actions for all injuries done to the body corporate; as if an injury is done

to one of the members by which the body at large is put to any damage, it may sue on that account.”

A suit in equity against officers or agents of the company may be brought by and in the name of the corporation, although, as a court of equity never permits a wrong to go unredressed merely for the sake of form, if the officers of the corporation should refuse to prosecute, the stockholders may in that case sue, making the corporation a party defendant. Angell & Ames, Sec. 312.

The same reasoning is, we think, applicable in the present case. Inasmuch as the collection of a judgment in favor of a withdrawing stockholder may be controlled by a court of equity, and may be stayed permanently where it turns out that the association was insolvent at the time of withdrawal, because such a stockholder is not entitled to priority of payment over his fellow-stockholders, the attempt to collect such a judgment by levy and sale is an injury to the body corporate, as well as to the stockholders, and the corporation itself may invoke the protection of a court of equity. “It is an elementary rule that, in equity proceedings, all persons whose rights may be injuriously affected by the proposed decree should be made parties.” Campbell v. Morgan, 4 Ill. App. 100–104.

The object of the proposed levy and sale would be to appropriate property of the corporation to satisfy the judgment. The corporation is the trustee, the guardian and representative of all its stockholders, and is bound to protect them against any withdrawing member seeking a priority to which he is not entitled.

We do not regard the alleged delay in filing the bill as *laches*. It does not appear that appellant has been prejudiced in any manner by the delay, and no necessity existed for asking the protection of equity so long as appellant made no effort to use his judgment for the purpose of securing a priority to which he is not entitled.

The order of the Circuit Court is affirmed.

MR. JUSTICE HORTON.

I can not concur in the decision of the court in this case,

in so far as it sustains the right of a corporation, as such, to maintain a bill in chancery like the one filed in this case, in its corporate name for its own benefit. And this is especially so where, as in this case, all the necessary steps and proceedings had been taken by the stockholders whereby the corporation had entered into voluntary liquidation, and trustees had been duly elected for that purpose as provided by statute.

MR. PRESIDING JUSTICE FREEMAN, on petition for rehearing.

We are strongly urged in the petition for rehearing, filed herein, to reconsider this case upon the ground that "it was the duty of the defendant to bring forward all its defenses," including insolvency, in the suit at law, where the appellant recovered his judgment against the association.

It may be conceded that, as claimed by counsel, the association, after such judgment, was "estopped to use anything against the judgment which it was its duty to have brought forward as a defense, and which was then or could then have been adjudicated."

The facts required by the statute, namely, notice of intention to withdraw, and funds in the treasury available for the purpose, must be presumed to have been found in favor of appellant when the judgment was rendered. But, unless the officers of the association knew, or had reason to know at that time, that it was insolvent, it could not properly set up such a defense. It is conceded by appellant's counsel that "if the association had, since the judgment, become insolvent, then, perhaps, another question would have arisen." If the knowledge of insolvency was acquired only since the judgment, the situation is practically the same.

The bill in this case alleges ownership by the association of real estate. Building associations are organized to make loans to their members, which are generally secured upon real estate. They may acquire title by foreclosure, and may be frequently compelled to take property upon which loans have been made. In times when land values are declining, they may be compelled to acquire real estate to

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such an extent that a large part of their assets are tied up in land for the time unsalable, and, if compelled to realize, they may thus be found insolvent. The knowledge of such insolvency would only exist, perhaps, when the effort to realize on such assets becomes a necessity. If not compelled to force its property on the market at a sacrifice while the depression in values continues, such an association might, finally, be able to pay all its debts. If sued by a withdrawing stockholder before it has been compelled to make an effort to realize, the association could not, in all probability, prove insolvency, although it is subsequently ascertained that such insolvency did then in fact exist.

We hold, therefore, to the view already expressed, that as the solvency of the association is not required, under the statute, to be proved by the plaintiff suing at law as a withdrawing member, in order to make out a *prima facie* case, it was not the duty of the association to interpose in such suit the defense of insolvency—at least unless it should appear that such insolvency not only existed but was then known or should have been known, to exist by the association and its officers; and that the judgment at law establishes no presumption "*res adjudicata*" in respect to solvency.

It is true, as urged, that the bill is not as full in its allegations as might be desired. We think, however, that the averments are sufficient to justify the interlocutory order granting the injunction, and that is the question presented on this appeal. Further than this we express no opinion.

The petition for rehearing is denied.

Independent Brewing Association v. John Powers.

1. **RATIFICATION**—*Equivalent to Prior Authority*.—Where an officer of a corporation executes a lease without authority a subsequent ratification cures the defect, and such ratification may be implied from the acts of the corporation.

2. **AFFIDAVITS**—*Construction of, When Read on Motions*.—Affidavits read in support of a motion must be construed most strongly against the party making the motion.

3. LEASE—*Repairs in the Absence of Covenants*.—Where a lease recites that the leasee received the premises in good condition, and contains no covenant by the landlord to repair, he is not bound to repair.

Motion to Set Aside a Judgment.—Heard in the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Motion denied; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed March 16, 1899.

LOESCH BROTHERS & HOWELL, attorneys for appellant.

The officers of a corporation have no implied power to execute a warrant of attorney to confess judgment against the corporation, and a judgment entered on a warrant so executed is void. Joliet Electric Light & Power Co. v. Ingalls, 23 Ill. App. 45; Adams v. The Cross Wood Printing Co. et al., 27 Ill. App. 313; Boston Tailoring House v. Fisher, 59 Ill. App. 400; Mast Buggy Co. v. Litchfield Implement Co., 55 Ill. App. 98; 4 Thompson on Corporations, Secs. 4695–4697; 2 Cook on Stockholders, Sec. 717, and notes; Ridley v. Plymouth, etc., Co., 2 Ex. 711.

E. S. CUMMINGS, attorney for appellee, contended that appellant ratified the lease and enjoyed its benefits, and must also bear its burdens; it can not repudiate the lease when it is to its interest to do so. L. N. A. & C. Ry. Co. v. Carson, 151 Ill. 450; National Brwg. Co. v. Ahlgren, 63 Ill. App. 475; Greer v. Sellers, 64 Ill. App. 505.

Ratification of an act done is equivalent to precedent authority and relates back to the execution of the power. Martin v. Judd, 60 Ill. 78.

The lease on its face shows a *prima facie* right and power in the secretary to execute it, and the judgment having been entered in term time, every presumption is in favor of it.

The presumption is that the seal used was the proper and only seal of the company. Miller v. Superior Machine Co., 79 Ill. 450; I. C. R. R. Co. v. Johnson, 40 Ill. 35; N. W. Distilling Co. v. Brant, 69 Ill. 658.

Although it is not the law that the power of attorney to confess judgment can only be exercised by a corporation under its corporate seal. Snyder Bros. et al. v. Bailey, 165 Ill. 447.

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MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from an order overruling a motion to set aside a judgment by confession for rent due by the terms of a lease. The lease contained a power of attorney to confess judgment. The signatures to the lease were as follows:

“JAMES G. POWERS. [SEAL.]

“INDEPENDENT BREWING ASSN. [SEAL.]

“J. HENRY ZITT, Sec'y.”

Appellant's counsel, in their argument, say: “The appeal in this case presents but one question, and that is, whether an officer of a corporation has power to execute a warrant to confess judgment against such corporation, without warrant given him by the board of directors so to do.”

The lease was of date December 23, 1892, and the term created by it was from January 1, 1893, until April 30, 1898. That appellee was the proper person to sue on the lease is not questioned.

Appellant, in support of its motion to vacate the judgment, read the affidavits of Leo Ernst, Fred W. Boldenweck and Paul Frickow. Ernst deposed that several months after he became appellant's president, he learned of the lease, and ascertaining that its execution had not been authorized by appellant, he caused the rent, up to and including February, 1897, to be paid and the keys to be surrendered to John Powers, and notified him that appellant would not pay any more rent; that appellant's president has no authority to execute any contract unless thereto authorized by the board of directors; that the execution of the lease by Zitt has never been ratified by the board of directors; that appellant vacated the leased premises February 28, 1897, on the ground of non-liability, and that appellant has a good and valid defense.

Boldenweck deposed that he had been appellant's secretary since September 12, 1896; that he had carefully examined the minute book of the meetings of the board of directors from January 1, 1892, to and including the last meeting, February 10, 1898, and that there was no entry of any authority to the president or secretary of appellant to

rent the premises described in the lease, or to execute the lease, or any warrant of attorney to confess judgment. Frickow deposed, in substance, that one Frazier was a tenant in possession of the premises for about two months prior to February 1, 1897, and was compelled to vacate and did vacate the same prior to February 16, 1897, on account of the roof being leaky and the bursting of water pipes, etc.

Appellee read the counter-affidavit of James G. Powers, the appellee, in opposition to the motion, who deposed, in substance, that subsequent to the execution of the lease, and in the second week of February, 1898, he was in need of money, and went to Zitt, then appellant's secretary, and proposed to him that if appellant would pay one year's rent in advance, he, Powers, would allow a discount; that Zitt informed him that he, Zitt, could not pass on the proposition, but would submit it to the board of directors; that February 12, 1893, he went to appellant's office and there met Zitt and Lange, who was then appellant's president, and that Zitt told him, in Lange's presence, that payment of one year's rent had been allowed by the board of directors, and thereupon the appellant's treasurer gave affiant a check for one year's rent, less the discount allowed by affiant. These affidavits conclusively show that from January 1, 1893, to and including February 28, 1897, four years and one month, the appellant was in the possession and enjoyment of the premises, and the uncontradicted affidavit of Powers shows that appellant's board of directors authorized and appellant paid a year's rent of the premises, in advance, after the execution of the lease. It is not stated positively, in any of the affidavits in support of the motion, that the board of directors did not authorize the execution of the lease, including the warrant of attorney to confess judgment, but merely that the minutes of the meetings of the board do not so show.

The affidavits in support of the motion must be construed most strongly against appellant. *Chi. Fire Proof Co. v. Park Nat. Bank*, 145 Ill. 481.

But whether there was prior authority to Zitt to execute the lease, is not important in view of the facts showing rati-

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fication, which is equivalent, in law, to prior authority. *Martin v. Judd*, 60 Ill. 78.

A ratification may be implied from appellant's acts in the premises. *The Louisville, N. A. & C. Ry. Co. v. Carson*, 151 Ill. 444; *Nat. Brewing Co. v. Ahlgren*, 63 Ill. App. 475; *Greer v. Sellers*, 64 Ill. App. 505.

No facts are alleged in the affidavits showing a meritorious defense, nor does any equitable reason appear for setting aside the judgment. *Crossman v. Wohlleben*, 90 Ill. 542; *Packer v. Roberts*, 140 Ill. 9.

The lease recites that the lessee received the premises in good condition; it contains no covenant by the landlord to repair and he was not bound to repair.

The order overruling the motion to set aside the judgment will be affirmed.

80	475
182	332
80	475
108	238

John B. Blank, Jr., v. Illinois Central Railroad Co.

1. **EXPRESS COMPANIES**—*Special Contracts with Railroad Companies.*—Special contracts between express and railroad companies, over whose lines express matter is carried, giving special and exclusive privileges to the former, are lawful.

2. **SAME**—*Rights of Employees.*—The rights of a messenger in the employ of an express company are the same as those of his employers, under special contracts with the railroads over whose lines he travels in discharge of his duties.

3. **EXPRESS MESSENGERS**—*Rights of, Under Transportation Contracts with Railroad Companies.*—Where a person is employed by an express company to take charge of its property in transit over the lines of a railroad under a contract which waives the right of recourse for damages on account of the negligence of the railroad company or its employees he accepts the terms of the contract by taking such employment and waives his right of recourse for damages in case of personal injuries.

4. **EMPLOYER AND EMPLOYEE**—*Where the Employee is Bound by His Employer's Contract with a Third Party.*—A person who enters into the employ of an express company to take charge of the packages which it transports in cars, and in which he rides over the lines of a railroad company under a special contract waiving the right to damages for personal injuries on account of the negligence of the railroad company, is chargeable with notice that the express company and himself, as

its representative, have the right to occupy such cars only by special license, which he can not do and at the same time hold the railroad company for any injuries he may sustain.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Judgment for defendant by direction of the court; error by plaintiff. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed March 14, 1899.

The contracts referred to in the opinion are as follows:

First. The contract between plaintiff and the American Express Company, viz.:

“Whereas, I, the undersigned, have entered or am about to enter the employment of the American Express Company, and in the course of such employment may be required to render services in the care, carriage or handling of merchandise and property in course of transportation by cars, vessels and vehicles belonging to the different railroad, stage and steamboat lines upon which the company relies for its means of forwarding property delivered to it to be forwarded.

And, whereas, such express company, under its contracts with many of the corporations and persons owning or operating such railroad, stage and steamboat lines, is or may be obligated to indemnify and save harmless such corporations and persons from and against all claims for injuries sustained by its employes.

Now, therefore, in consideration of the premises and of my said employment, I do hereby assume all risk of accidents and injuries which I shall meet with or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel, or vehicle, or of any employe of any such corporation or person, or otherwise, and whether resulting in my death or otherwise.

And I do hereby agree to indemnify and save harmless the American Express Company of and from any and all claims which may be made against it at any time by any corporation or person under any agreement which it has made, or may hereafter make, arising out of any claim or recovery upon my part, or the part of my representatives, for damages sustained by reason of my injury or death, whether such injury or death result from the gross negli-

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gence of any person or corporation, or of any employe of any person or corporation or otherwise.

And I hereby bind myself, my heirs, executors and administrators with the payment to such express company, upon demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

And I do further agree that in case I shall at any time suffer any such injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or persons owning or operating the railroad, stage or steamboat line upon which I shall be so injured, a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury or connected with or resulting therefrom.

I do hereby ratify all agreements heretofore made by said express company with any corporation or persons operating any railroad, stage and steamboat line in which such express company has agreed in substance that its employes shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every such agreement, in so far as the provisions thereof relative to injuries sustained by employes of the company are concerned, as fully as if I were a party thereto.

And I do hereby authorize and empower said express company, at any time while I shall remain in its service, to contract for me and in my behalf, in its own name or in mine, with any corporations or persons operating any railroad, stage or steamboat lines, for my transportation as a messenger or employe free of charge, upon the condition and consideration that neither I nor my personal representatives, nor any person claiming under me, will make any claim for compensation because of any injury sustained by me whether resulting from the gross negligence of such corporations or persons, or of any employe of such corporations or persons, or otherwise, and the contracts so made shall be as binding and obligatory upon me as if signed and delivered by me.

And I do hereby further agree that the provisions of this agreement shall be held to inure to the benefit of any and every corporation, and of all persons upon whose railroad, stage or steamboat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons.

I do further agree, in consideration of my employment by said American Express Company, that I will assume all risks of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the negligence of said company or any of its members, officers, agents or employes, or otherwise, and that in case I shall at any time suffer any such injury I will at once execute and deliver to said company a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury or connected therewith, or resulting therefrom; and I hereby bind myself, my heirs, executors and administrators, with the payment to said express company, on demand, of any sum which it may be compelled to pay in consequence of any such claim or in defending the same, including all counsel fees and expenses of litigation connected therewith.

Witness my hand and seal this 20th day of November, one thousand eight hundred and ninety-three.

(Signed) JNO. BLANK.

In the presence of

(Signed) S. A. DAVIS."

Second. The contract between the American Express Company and the defendant, viz.:

"Whereas, by a certain contract, dated the 20th day of March, A. D. 1893, the Illinois Central Railroad Company, as party of the first part, and the Yazoo and Mississippi Valley Railroad Company, as party of the second part, and the American Express Company, as party of the third part, among other things, agreed as follows:

'As one of the express conditions of this contract, the party of the third part hereby binds and obligates itself to save harmless and fully indemnify the parties of the first part and second parts and each of them, their respective officers and employes, from and against all actions and liabilities for loss or damage resulting in any manner whatsoever to the freight or express matter in charge of the party of the third part, or to any of its employes, agents, messengers or officers, upon any line covered by this agreement; it being distinctly understood and agreed that all damages resulting to express matter or to persons in the service of the party of the third part (while engaged in such service) shall be borne by the American Express Company.'

And whereas, since making said contract, said parties have, in the interests of mutual economy, upon certain trains and upon certain lines, consolidated the work of the bag-

gageman employed by the party of the first or second part, with the work of the express messenger employed by the party of the third part—so that the same person acts as joint employe of the party of the first or second part and the party of the third part, a portion of his salary being paid by the party of the first or second part and the balance by the party of the third part, in pursuance of an agreement to that effect heretofore made by the parties hereto.

Now, therefore, in consideration of the premises and other valuable considerations, each to the other paid, the said parties hereby mutually agree that the said contract, and the clause therein which is above quoted, shall be, and the same is hereby modified and changed to read as follows:

‘As one of the express conditions of this contract, the party of the third part hereby binds and obligates itself to save harmless and fully indemnify the parties of the first and second parts, and each of them, their respective officers and employes, from and against all actions and liabilities for loss or damage resulting in any manner whatsoever to the freight or express matter in charge of the party of the third part, or to any of its employes, agents, messengers, or officers, upon any line covered by this agreement; it being distinctly understood and agreed that all damages resulting to express matter or to persons in the service of the party of the third part (while engaged in such service) shall be borne by the American Express Company.

‘Provided, however, that in all cases where the same person acts jointly as baggageman for the party of the first or second part, and express messenger for the party of the third part, then that any sum or sums paid out in settlement or satisfaction of any claims made, or judgment recovered, on account of injuries sustained by such joint employe while performing duties exclusively in the interest of the party of the first and second part, outside of and away from the car in which the baggage and express packages in his charge are carried, while traveling as aforesaid, on said road, shall be assumed and borne by the party of the first or second part. But, if any claim is made, or judgment recovered, on account of injuries sustained by any such joint employe while traveling as aforesaid, on such road, while performing duties in the interest of either or any of the parties hereto, in or upon the said baggage and express car, then such sum or sums shall be borne and paid by both or all of the parties hereto, in the same proportion as they may have contributed to the salary of such employe at the time such injuries were sustained by him. Neither party, however,

I do further agree, in consideration of my employment by said American Express Company, that I will assume all risks of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the negligence of said company or any of its members, officers, agents or employes, or otherwise, and that in case I shall at any time suffer any such injury I will at once execute and deliver to said company a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury or connected therewith, or resulting therefrom; and I hereby bind myself, my heirs, executors and administrators, with the payment to said express company, on demand, of any sum which it may be compelled to pay in consequence of any such claim or in defending the same, including all counsel fees and expenses of litigation connected therewith.

Witness my hand and seal this 20th day of November, one thousand eight hundred and ninety-three.

(Signed) JNO. BLANK.

In the presence of

(Signed) S. A. DAVIS."

Second. The contract between the American Express Company and the defendant, viz.:

"Whereas, by a certain contract, dated the 20th day of March, A. D. 1893, the Illinois Central Railroad Company, as party of the first part, and the Yazoo and Mississippi Valley Railroad Company, as party of the second part, and the American Express Company, as party of the third part, among other things, agreed as follows:

'As one of the express conditions of this contract, the party of the third part hereby binds and obligates itself to save harmless and fully indemnify the parties of the first part and second parts and each of them, their respective officers and employes, from and against all actions and liabilities for loss or damage resulting in any manner whatsoever to the freight or express matter in charge of the party of the third part, or to any of its employes, agents, messengers or officers, upon any line covered by this agreement; it being distinctly understood and agreed that all damages resulting to express matter or to persons in the service of the party of the third part (while engaged in such service) shall be borne by the American Express Company.'

And whereas, since making said contract, said parties have, in the interests of mutual economy, upon certain trains and upon certain lines, consolidated the work of the bag-

gageman employed by the party of the first or second part, with the work of the express messenger employed by the party of the third part—so that the same person acts as joint employe of the party of the first or second part and the party of the third part, a portion of his salary being paid by the party of the first or second part and the balance by the party of the third part, in pursuance of an agreement to that effect heretofore made by the parties hereto.

Now, therefore, in consideration of the premises and other valuable considerations, each to the other paid, the said parties hereby mutually agree that the said contract, and the clause therein which is above quoted, shall be, and the same is hereby modified and changed to read as follows:

‘As one of the express conditions of this contract, the party of the third part hereby binds and obligates itself to save harmless and fully indemnify the parties of the first and second parts, and each of them, their respective officers and employes, from and against all actions and liabilities for loss or damage resulting in any manner whatsoever to the freight or express matter in charge of the party of the third part, or to any of its employes, agents, messengers, or officers, upon any line covered by this agreement; it being distinctly understood and agreed that all damages resulting to express matter or to persons in the service of the party of the third part (while engaged in such service) shall be borne by the American Express Company.

‘Provided, however, that in all cases where the same person acts jointly as baggageman for the party of the first or second part, and express messenger for the party of the third part, then that any sum or sums paid out in settlement or satisfaction of any claims made, or judgment recovered, on account of injuries sustained by such joint employe while performing duties exclusively in the interest of the party of the first and second part, outside of and away from the car in which the baggage and express packages in his charge are carried, while traveling as aforesaid, on said road, shall be assumed and borne by the party of the first or second part. But, if any claim is made, or judgment recovered, on account of injuries sustained by any such joint employe while traveling as aforesaid, on such road, while performing duties in the interest of either or any of the parties hereto, in or upon the said baggage and express car, then such sum or sums shall be borne and paid by both or all of the parties hereto, in the same proportion as they may have contributed to the salary of such employe at the time such injuries were sustained by him. Neither party, however,

shall have the right to compromise or settle any claim or suit for such injuries without the consent in writing of the other parties hereto.'

This contract shall be in force and take effect from and after the 28th day of December, 1895, and continue until the 31st day of March, 1898.

THE ILLINOIS CENTRAL RAILROAD COMPANY,
By J. T. Harahan, 2d Vice President.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD
COMPANY,
By J. T. Harahan, 2d Vice President.
THE AMERICAN EXPRESS COMPANY,
By A. Antisdel, General Manager."

STRONG, STRUCKMANN, EHLE & MILSTED, attorneys for plaintiff in error.

A master can not, by a contract with a servant, in consideration of the employment, exempt himself from liability to the servant for injuries sustained through the negligence of the master, such a contract being void as against public policy. Am. & Eng. Enc. of Law, Vol. XIV, 910; Roesner v. Hermann, 8 Fed. Rep. 782; Eckman v. C., B. Q. R. R. Co., 169 Ill. 318; Beach on Contributory Negligence, 2d Ed., Sec. 383; Railway Co. v. Spangler, 44 O. St. 471; Little Rock Ry. Co. v. Eubanks, 48 Ark. 460; Bailey on Master's Liability for Injuries to Servants, p. 447, paragraph 3; Hisong v. R. R. Co., 91 Ala. 514; Purdy v. Rome, etc., R. R. Co., 52 Hun, 267; 125 N. Y. 209.

An express messenger is a passenger for hire. Voight v. Balto. & O. S. W. Ry. Co., 79 Fed. Rep. 561, and long list of cases cited.

The accident release introduced by defendant in error is void as against public policy. Voight v. B. & O. S. W. Ry. Co., 79 Fed. Rep. 561.

WALKER & EDDY, attorneys for defendant in error, contended that the contract was not void as against public policy but was valid and binding, and constituted a complete defense to the action.

Similar contracts have been sustained by the Supreme Court of Indiana, in opinions which are remarkable for

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their exhaustive review of the authorities. Louisville, N. A. & C. Ry. Co. v. Keefer, 44 N. E. Rep. 796; Pittsburg, C., C. & St. L. Ry. Co. v. Mahoney, 46 N. E. Rep. 917.

The right of a railroad company to insist upon an accident release from an express messenger riding in a baggage car, although riding upon a passenger season ticket, is upheld by the Supreme Court of Massachusetts in Bates v. Old Colony R. Co., 17 N. E. Rep. 633; Hosmer v. Old Colony Ry. Co., 31 N. E. Rep. 652.

Railway companies, although public or common carriers, may contract as private carriers, such as that of transporting express matter for express companies, as such matter is usually carried, and in that capacity may properly require exemption from liability for negligence as a condition to the obligation to carry. The Express Cases, 117 U. S. 1, 6; Hosmer v. Railroad Co., 156 Mass. 506, 31 N. E. 652; Bates v. Railroad Co., 147 Mass. 255, 17 N. E. 633; Chic., M. & St. P. R. Co. v. Wallace, 66 Fed. 506; Coup v. Railway Co., 56 Mich. 111, 22 N. W. 215; Forepaugh v. Railway Co., 128 Pa. St. 217, 18 At. 503; Hartford Fire Ins. Co. v. C., M. & St. P. Ry. Co., 17 C. C. A. 62, 70 Fed. 201; Quimby v. Railroad Co., 150 Mass. 365, 23 N. E. 205; Muldoon v. Railway Co., 10 Wash. 311, 38 Pac. 995; Griswold v. Railroad Co., 53 Conn. 371, 4 At. 261.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The plaintiff was a messenger for the American Express Company, on the defendant's line of road between Chicago and Sioux City, Iowa. On January 15, 1896, the passenger train on which he was riding in the baggage car, in which the express matter he had in charge was being carried, ran into the rear corner of the caboose of a freight train which had been partly pulled off upon a switch or side track in order to permit the passenger train which plaintiff was riding, to pass. The rear end, only, of the caboose projected upon the track of the passenger train, and a piece of one of its timbers broke into the express car and hit the plaintiff and caused the injuries of which he complains.

It appeared in evidence that the first cause of the caboose being left in its dangerous place, was the breaking of a link in the chain of freight cars that were being hauled off upon the side track, causing the freight train to separate, and leaving its extreme end—the caboose—projecting in part upon the main track.

Whether or not the defendant was liable for negligence in respects of the broken link, and the consequent collision, will not be discussed at length by us at this time, although we have considered the case in that aspect. The evidence showed, without controversy, that the defect in the link which caused it to break was a latent one, beyond discovery by the exercise of all reasonable diligence; but whether, after the break, there was not time enough before the collision, in the exercise of proper diligence by defendant's servants, to have got the caboose clear of the main track, is not so certain.

We prefer to place our decision upon the point that caused the trial court to take the case from the jury, by a peremptory instruction to find the defendant not guilty.

That point is that, whether there was legal negligence by the defendant or not, the plaintiff had by special contract, previously entered into, released the defendant from all liability in the premises.

We will not particularly enter upon the contention of plaintiff that such contract of release was improperly admitted in evidence under the condition of the pleadings at the time of the trial. It is enough for the purpose of getting directly at the main question in the case, which demands early decision because not only of what is involved in this case but collaterally, to hold, without much discussion, that the release was admissible.

The plaintiff had testified to his employment with the express company, that he knew the terms of his employment and that they were set forth in the writing identified by him as bearing his signature. The writing was then, we think, clearly admissible under the general issue, in order to show the terms and conditions of plaintiff's employment

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by the express company, and his relation to the defendant at the time of the accident.

The relationship of express companies to railroad companies, over whose lines express matter is carried under special contracts, is well set forth in *Express Cases*, 117 U. S. 1, to which we refer rather than quote from, and the doctrine there upheld is, that special contracts between such companies, giving special and exclusive privileges to express companies, are lawful.

It was by virtue of the contract between the defendant and the express company that the plaintiff was upon the car when he was injured. He was not in the strict sense a passenger. Nor was the defendant in the strict sense a common carrier as to him. His being carried from one end of the express route to the other, was for the purpose, and none other, of handling and caring for the property of his employer, the express company, which was being transported under the terms of the special contract between the express company and the defendant.

It was not the duty of the defendant, as a common carrier, to carry for the express company its goods, or its messenger in charge of them, in the car in question. As a common carrier the defendant was not compelled to grant that right to the express company. It was only because of the special contract that such rights, superior to the rights of the public, were conferred, and being upon the car by virtue of such contract rights, the plaintiff was there subject to the burdens of the contract. His rights were those of his employer, the express company, and no greater. He could not accept the right to be there under the contract, and reject the conditions under which the contract gave the right.

Had the defendant occupied in the premises the position of performing a public or quasi public duty to the plaintiff, such as it would have held to him if he were being carried as an ordinary passenger, we understand the law would not have permitted him to contract away his right of recourse for damages for the defendant's negligence, and in no case

could a common carrier, even by express contract, in Illinois, exempt itself from liability resulting from the gross negligence or willful misconduct committed by itself or its servants. *C. & N. W. Ry. Co. v. Chapman*, 133 Ill. 96; *I. C. R. R. Co. v. Read*, 37 Ill. 484.

But, under the evidence, there does not arise in this case any question of gross or willful negligence.

As already said, the defendant was not, as to the plaintiff or his employer, in the discharge of the public duties required of it as a common carrier, and the plaintiff might, therefore, as he did, contract to assume the risks of the trip himself, and release the defendant from all liability on account of injuries to him.

The plaintiff in his contract with the express company ratified, as his own, and made a part of such contract, the contract between the express company and the defendant, and agreed to be bound thereby. He was bound, therefore, to know that the express company, and himself as its representative, had a right to ride in the car only by special license, which he could not accept and at the same time continue to hold defendant liable for injuries that might befall him.

It is not pretended that what we have said constitutes an exhaustive or thorough opinion upon the question. It is one not yet decided by our Supreme Court, and the little we have said is mainly, though imperfectly, taken from opinions of the Supreme Court of Indiana, which commend themselves to us by the reason and authority there shown.

A reference to *Louisville, N. A. & C. Ry. Co. v. Keefer*, 146 Ind. 21, and *Pittsburgh, C., C. & St. L. Ry. Co. v. Mahoney*, 148 Ind. 196, where similar contracts were involved and able discussion is had, will serve the purposes of counsel in this case, and the profession generally, as well as could be done by an exhaustive opinion here.

Numerous minor questions are argued, concerning which we discover nothing amounting to reversible error or requiring further comment.

The judgment of the Superior Court is affirmed.

Elisha C. Ware v. Edward H. Salsbury.

1. **EQUITY PRACTICE—*Effect of Sworn Answers.***—So far as a sworn answer, when called for, is responsive to the allegations of the bill, it must be taken as true, unless it is overcome by evidence equivalent to the testimony of two witnesses.

Bill of Discovery, etc.—Trial in the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Hearing and decree for complainants on master's report; appeal by defendant. Heard in this court at the October term, 1898. Reversed and remanded with directions. Opinion filed March 16, 1899.

Appellee filed his bill in April, 1895, charging, in substance, that appellant, a real estate agent in Chicago, was employed by him, appellee, as his agent, in September, 1890, to purchase for appellee certain lands in Jasper county, Indiana; that appellant did, in pursuance of such agency, purchase one tract of land of 720 acres from one Ingraham, at the price, as appellee then supposed and was informed by appellant, of \$12 per acre, and another tract of 480 acres from one Wood, at the price, as appellee then supposed and was informed by appellant, of \$8 per acre; that appellee paid to appellant said prices, respectively, for said tracts, upon the representation by appellant that the lands cost said amounts per acre, and received through him conveyances therefor from said Ingraham and Wood, under the belief that his said agent in fact paid to said Ingraham and Wood the amounts so paid by appellee; that a short time prior to the filing of the bill, he, for the first time, ascertained that he had been deceived by appellant in regard to the price paid by appellant for said lands, and that appellant in fact paid to said Ingraham only \$5,040, instead of \$8,640, as represented by appellant, and to one Thompson, but not to Wood, as appellee supposed, only \$1,600, instead of \$3,840, as appellee supposed; that Wood took the title from Thompson and conveyed it to appellee as an accommodation to appellant, and to prevent appellee from knowing what was in fact paid by appellant for the lands.

The bill asks for discovery and an accounting, but waives answer under oath.

After a demurrer was interposed and sustained, appellee amended his bill, making further allegations as to the details of his dealings with appellant, but not changing materially the scope of the bill, and amended the original bill by striking out the waiver of answer under oath, and prayed that the bill, as amended, be answered under oath.

A special demurrer was interposed and confessed, the bill was again amended, a third demurrer was filed and the bill for the third time amended, leaving it, as finally amended, calling for appellant's answer under oath. Appellant answered under oath, denying that he ever, at any time, acted as agent of appellee in the purchase of the lands mentioned in the bill, that he made any of the fraudulent representations set up in the bill, and admits that he purchased the property for the prices alleged in the bill from Ingraham and Thompson, but denies that the purchases were made for appellee; alleges that he made such purchases on his own account, and alleges that he sold the lands to appellee, those from Ingraham at \$12, and those from Thompson at \$8 per acre, and received from appellee for such lands the amounts alleged by the bill; alleges that after he submitted to appellee the lands for sale, and before their purchase by him, appellee went on two occasions and examined the lands, one time taking his wife with him, but without appellant's knowledge at the time; that appellee made the said purchases after full investigation and knowledge of the lands, and as to the value; that the lands were well worth the prices paid by appellee; that appellee suffered no loss or damage, but resold the lands with large profit long before the bill was filed; that appellee never offered to pay and never paid appellant for his alleged services as agent, and that he, appellant, never presented any bill to appellee for services.

Replication to the answer having been filed, the cause was referred to a master, who took the evidence and reported to the court, sustaining appellant's claims in sub-

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stance, and while he does not find that Ware acted as agent for appellee, he reports, among other things, viz. :

“Ware swears that he had a prior option for the purchase of this property, and that he sold to Salsbury, and that as to both deals he was not acting for Salsbury at all, but for himself.

He never informed Salsbury that he owned or had any interest in those tracts, and Salsbury was undoubtedly led to believe that he was purchasing directly from Wood and Ingraham through Ware.

Ware and Salsbury contradict each other in a great many particulars, but the testimony of Ingraham and Sigler, and other circumstances, tend to discredit Ware. The master is of the opinion that Ware merely obtained net prices from the owners, and when he found that he could sell at a profit, he determined to do so, and to keep the sellers and Salsbury in the dark as to the price paid and received. It is immaterial whether Ware acquired his interest before or after his sale to Salsbury, or whether he had any contracts with the owners or not. Salsbury was led to believe that Ware was acting for him, and the result would be the same if Ware owned them all the time and concealed that fact from Salsbury and induced him to believe that some one else owned the land, and thus obtained from him a larger price than he could have obtained had the facts been known. No commission was paid or agreed to be paid to Ware or to any one in connection with these deals.

Salsbury never learned of the facts until a short time prior to the filing of the bill herein.

Prior to purchasing these tracts Salsbury and his wife went alone to look at the land. It does not appear whether Salsbury inquired of any one else as to the value of these lands. Ware told Salsbury that he could make a good profit, and it appears that he did realize a good profit on a sale of the lands.

Much stress is laid by defendant's solicitor on the fact that no commission was agreed to be paid, and none was paid, and the claim is insisted on that no relation of agency or of trust existed between Salsbury and Ware, that no misrepresentations as to value were made, and that Ware's predictions as to profits were realized. It does seem strange, at first, that nothing was said about commissions, but this is not unusual. Ware evidently was satisfied with his profit, and Salsbury was content if the commissions were not asked for. Salsbury got what he bargained for, and made the

profit which he expected, and in one sense was not damaged, but it can not be doubted that had he known the true state of affairs, he would not have paid more for this land than the owners were asking.

Ware led him to believe that he (Ware) was not interested, and that the lands were worth the price paid when they could have been had for less. Had Salsbury known that he was buying of Ware, he would have made inquiry elsewhere as to what lands could be bought for in that vicinity. Salsbury trusted Ware, and Ware had no right to take advantage of it. This case comes within the rule that one occupying a trust relation can not take advantage of it and make a profit."

This report was confirmed by the chancellor, on the hearing of exceptions thereto, the findings of the decree following, in substance, the master's findings and conclusions. The chancellor also found that appellant, in July or August, 1890, told appellee that he, appellant, could get appellee a tract of one and three-fourths sections of land in Jasper county, Indiana, at \$10 per acre, and also "that Salsbury was dealing with Ware, if not as his agent, yet in such a way that a trust relationship existed between them, and Ware had no right to take advantage of that relationship; that Ware occupied a position where trust and confidence were placed in him, and he could not take advantage of that trust and confidence to make a profit for himself which properly belonged to another. That Ware had a manager on his own tract named C. C. Sigler, and Ware had an understanding with him that if he could procure some low prices on tracts in that vicinity and assist Ware in showing lands and making sales, that he, Ware, would furnish any funds needed and share any profits which could be made out of the deals with Sigler.

The court further finds that Ware paid Sigler \$2,840 as his share of the profits in these transactions, and to A. Thompson & Brother the sum of \$25 for an opinion of title, which sums should be deducted from the entire amount received by Ware," and decreed that appellant pay to appellee the moneys he had received from appellee in excess of the amounts paid by appellant to Ingraham and Thompson,

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after deducting \$2,865 paid to Sigler, and for the opinion of title. From this decree the appeal is taken.

Appellee has assigned a cross-error, to the effect that the court erred in allowing appellant \$2,865, paid to Sigler.

WALTER M. HOWLAND, attorney for appellant.

HARRY L. IRWIN, attorney for appellee.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

The only question presented which we deem it necessary to consider, is whether the evidence is sufficient to support the findings of the chancellor, when it is considered that the bill called for an answer under oath, that the cause was heard upon bill, the sworn answer of defendant, replication thereto, master's report and exceptions thereto, together with the evidence taken by the master.

In so far as a sworn answer, when called for, is responsive to the allegations of the bill, it must be taken as true, unless it is overcome by evidence equivalent to the testimony of two witnesses. *Stauffer v. Machen*, 16 Ill. 553; *Marple v. Scott*, 41 Ill. 60; *Walton v. Walton*, 70 Ill. 144.

In so far as there was any relation of agency or of trust and confidence alleged in the bill to have existed between appellee and appellant, it is squarely and unequivocally denied by the answer. The only evidence which, in our opinion, supports the allegations of the bill in this respect, is that of appellee, and this, under the rule announced, is not sufficient to overcome the sworn answer of appellant.

Appellee contends that appellant had made arrangements for appellee to take these two tracts of lands before he in any way obligated himself to either said Thompson or Ingraham to buy from them, and even on his own testimony, only had a verbal price on the lands from the owners; that appellant did not at any time represent to appellee that he was the owner of the lands; that appellant paid money received from appellee in the purchase of the lands, and

that these circumstances are conclusive of the correctness of the learned chancellor's disposition of the case. We can not assent to this contention. Neither of these matters, even if conceded to be clearly established, would be inconsistent with appellant's claim that he did not act as agent for appellee, nor sustain to him any relation of trust or confidence.

We are inclined to the view, from a consideration of the evidence, that appellant's conduct was such as to leave the impression with appellee that he was purchasing the lands from Ingraham and Wood, instead of from appellant, but think that fact and the further fact, which also appears from the evidence, that Wood took the title for appellant as a matter of accommodation, though a deception and fraudulent in its nature toward appellee, are not conclusive in appellee's favor, and can not avail him in this case. They are consistent with an agency or act of friendship on the part of appellant toward Wood and Ingraham, and in the light of appellant's evidence that he had a verbal contract for the purchase of the lands from Ingraham and Thompson, and that he paid Wood \$20 to execute two notes of \$550 each, secured upon the land, and assumed to be paid by appellee, that appellant was in fact making the sale on his own account to appellee, and took this method to avoid making one set of conveyances.

Appellant did not in words represent that he was the owner of the lands sold, and appellee's evidence as to their dealings would tend to show that appellant was acting as agent of the owners rather than as agent for appellee. In any event there is a failure to show by any evidence clear and conclusive in its nature, either agency or a relation of trust and confidence between them.

Appellee quotes the following from appellant's evidence, viz.: "I told Mr. Salsbury I was operating in cheap lands in Indiana, and that I knew of land down there that he could buy for \$10 an acre. That we were improving the country, and that in my opinion he could sell this land for \$18 an acre within a year. I showed him a plat of land in

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my office, and told him that Nelson Morris ultimately would buy it; that I felt very sure he could sell it to him, as I owned a piece there of 2,600 acres of my own, and that I could sell him land at a less figure than Mr. Morris had already offered me for mine, and that when we got these ditches completed, the land he bought would be worth as much as mine at that time—the land that I had already bought,” and claims that it and certain statements and receipts in the handwriting of appellant, purporting to be statements of settlement with Ingraham and the Wood purchase, and the receipts showing that he received of Wood and Salsbury a check and contract relating to the Wood purchase, to be held in escrow for thirty days, and also the receipt of \$500 from Salsbury to apply on account of the purchase, and a deed from Wood to Salsbury of the land, to be delivered on the further payment of the balance in cash and notes to make up the full purchase price of \$3,840, show the agency alleged as well as the relation of trust and confidence between appellee and appellant.

We think the claim is not tenable. These statements and receipts appear to have been made out by appellant in the presence of appellee, and there is no evidence called to our attention or which we have been able to discover in the record tending to explain them in a way inconsistent with appellant's answer and evidence. The receipts of themselves would tend to show that appellant was a mere stakeholder, representing both parties. The statements might be said to indicate an agency, or merely memoranda to show the items of a transaction between appellee and Ingraham and Wood, the two latter being represented by appellant as their agent. Taken together, we think they are important only as tending to show deceit on the part of appellant, but by no means what is contended by appellee.

The evidence quoted is only the expression of an opinion by appellant as to present and future prices and a purchaser for land he might buy, in connection with a statement as to what was being done in the locality in question to make the land valuable, and what appellant claimed he could

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sell land to appellee for. We are unable to perceive how this evidence in any way tends to establish appellee's contention, and especially so when it is read in connection with the other evidence given by appellant.

Appellant's opinion is shown by the evidence to have been a good one, as appellee in sixteen months sold his land at an advance of \$10,000, at a profit of at least \$6,000, on a purchase of \$12,000, and he sold appellee land at less than \$10.50 per acre, a price satisfactory to him, and he was in no way damnified.

No commission or compensation for appellant's services was asked by him, nor was it inquired about by appellee, which of itself was sufficient to put him upon inquiry as to what was appellant's interest in bringing about the transaction. Had appellant sought to recover commissions in a suit at law, upon the evidence in this record, we are inclined to the view that it is insufficient to sustain a judgment in his favor, whereas, in this case, appellee's proof, to justify a recovery, should be much stronger than at law, where his evidence need only equal that of appellant in order to prevail.

It is unnecessary to consider the other questions argued and the cross-error assigned by appellee.

The decree is reversed and the cause remanded, with directions to dismiss appellee's bill for want of equity.

Reversed and remanded with directions.

**Chicago Architectural Iron Works v. Augusta Nagel,
Adm'x, etc.**

1. INSTRUCTIONS—*When Defective*.—An instruction which does not state the law with reference to the relation of fellow-servants, but requires the jury to determine whether employes of the defendant who did the work in question were or were not such fellow-servants, submits to the jury the question of both law and fact, and is defective.

2. FELLOW-SERVANTS—*Definition of, a Matter of Law*.—The definition of fellow-servants is a matter of law.

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3. **SAME—*What Falls Within the Definition, a Question of Fact.***—It is always a question of fact, to be determined from the evidence, whether a particular case falls within the definition of fellow-servants.

4. **SAME—*Who Are—Respondeat Superior.***—In order to constitute servants of the same master, fellow-servants, within the rule of *respondeat superior*, it is essential that they be, at the time of the injury complained of, directly co-operating with each other in the particular business in hand, or that their usual duties bring them into habitual consociation, so that they may exercise an influence upon each other promotive of proper caution.

5. **SAME—*Rule Should Be Given to Jury with Accuracy—Question of Fact.***—The rule should be given to the jury with substantial accuracy, and the jurors left free to declare, from the evidence, their determination upon the question of fact.

6. **MASTER AND SERVANT—*One Servant in Different Relations to Co-servants.***—One servant may be, in relation to a co-servant, a vice-principal in one relation and a fellow-servant in another, the particular relation depending upon the particular duties he is discharging at the time. It does not necessarily follow, because one is a foreman and general representative of the master, that he is such representative in all relations to his fellow employes, so as to make the master liable for his negligence.

7. **SAME—*Rule as to Master's Liability.***—The mere fact that one of a number of servants who are in the habit of working together in the same line of employment, for a common master, has power to control and direct the actions of the others, will not of itself render the master liable for the negligence of the governing servant, resulting in an injury to one of the others, without regard to other circumstances.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed March 14, 1899. Rehearing denied April 7, 1899.

This is a suit for personal injury resulting in the death of one Richard Nagel, and occasioned by the fall of a scaffold. The appellant company was engaged in the erection of a balcony attached to a building situated on the corner of Michigan avenue and Van Buren street, Chicago.

It is said by appellee that the work was done clandestinely and without permission of the authorities, and that therefore more men were employed than otherwise would have been necessary, and that extraordinary haste was used

in order to finish the work before an injunction could be procured to restrain its prosecution. The work was done at night. It is contended that the scaffolds were improperly constructed in consequence of the haste with which the work was attempted to be done. The men had been working from eleven o'clock in the evening until about five o'clock in the morning.

It appears that much of the material had already been put in place, including iron castings and beams, when the accident occurred. The castings were said to have been about five feet in length. They were inserted in the wall, fastened by bolts and supported by brackets. One of them, for some reason, was not quite high enough, and at the time the accident occurred, there were some six or seven men upon the scaffold, who, with their shoulders under the balcony, were attempting to lift it up in order to get it high enough to insert a bolt in the proper place. It was about a quarter of an inch too low, according to the testimony of one of appellant's witnesses. The weight of the men, together with the additional force brought to bear upon the scaffold in the effort to lift the balcony into its place, broke the scaffold, causing the injuries to the deceased for which it is sought to recover.

M. SALOMON and FRANK WHITNEY, attorneys for appellant.

MOSES, ROSENTHAL & KENNEDY, attorneys for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

The evidence with reference to the questions of fact is conflicting. If the law was properly presented to the jury by accurate instructions, we might not feel authorized to disturb the finding. On behalf of the plaintiff the court gave the following instruction :

“ The court further instructs the jury that it is a question of fact, for them to decide, whether the employes of the defendant company who were in charge of the building of the balcony, if you find such to be the evidence, were fel-

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low-servants of Richard Nagel, or whether they stood towards him in the relation of representatives of the master, and if the jury believe from the evidence that such foreman or foremen, if you find such to be the evidence, in and about the doing of said work, were the representatives of the Architectural Iron Works, and were not fellow-servants, then the defendant is responsible for the acts of such foreman or foremen, within the scope of their authority, in doing said work."

We are compelled to agree with the contention that this instruction, standing alone, is defective. It does not undertake to state the law with reference to the relation of fellow-servant, and yet the jury are required by this instruction, to determine whether the employes of the defendant company who constructed the balcony were or were not such fellow-servants. In other words, the instruction submits to the jury the question both of law and fact. The definition of fellow-servants is a question of law, and, as has been said in *C. & N. W. Ry. Co. v. Moranda*, 108 Ill. 576, 581, "it is always a question of fact, to be determined from the evidence, whether the particular case falls within the definition." In that case it was said that in order to constitute servants of the same master fellow-servants, within the rule *respondeat superior*, * * * it is essential that they shall be, at the time of the injury, directly co-operating with each other in the particular business in hand, or that their usual duties shall bring them into habitual consociation, so that they may exercise an influence upon each other promotive of proper caution;" and "it is essential, not only that the rule shall be given to the jury with substantial accuracy, but also that the jurors shall thereupon be left free to form and declare, from the evidence before them, their opinion upon the question of fact."

There was evidence in this case that the men upon the scaffold at the time when the accident occurred were directly co-operating with each other, not only in the erection of the scaffold, but in the particular thing which caused the accident. They were lifting together upon a heavy piece of iron work, putting upon the scaffold not only their own weight, but also the additional weight of the balcony, so

far as by their united strength they were able to exert such pressure. It was therefore important, when the jury were told that it was a question of fact, for them to decide, whether these employes were fellow-servants, that they should also be told what constituted fellow-servants in law. It was not a matter for them to conjecture or guess at, but a matter about which they should be definitely instructed. This was not done in this or any other instruction. The effect is much the same as if the jury had been instructed to find a fact as to which there was no evidence.

The jury were told that if they believed from the evidence that the foreman or foremen were representatives of the defendant company, and not fellow-servants of the deceased, then the defendant was responsible for their acts within the scope of the authority of such foreman in doing said work. The question was, therefore, important, what was the scope of the authority of the foremen, and was it in pursuance of such authority that the deceased was exposed to the injury?

In *M. & O. R. R. Co. v. Godfrey*, 155 Ill. 78, it is said: "One servant may be, in relation to a co-servant, a vice-principal in one relation and a fellow-servant in another, the particular relation depending upon the particular duties he is discharging at the time." It does not necessarily follow, because one is a foreman and general representative of the master, that he is such representative in all relations to his fellow employes, so as to make the master liable for his negligence.

There was evidence tending to show that a foreman was working with the other employes and doing exactly what they were doing at the time of the accident. The principle is stated in *C. & A. R. R. Co. v. May*, 108 Ill. 298. In that case the court says:

"The true rule, as we understand it, is this: The mere fact that one of a number of servants who are in the habit of working together in the same line of employment, for a common master, has power to control and direct the actions of the others, with respect to such employment, will not of itself render the master liable for the negligence of the

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governing servant, resulting in the injury to one of the others, without regard to other circumstances. On the other hand, the mere fact that the servant exercising such authority sometimes or generally labors with the others as a common hand, will not of itself exonerate the master from liability for the former's negligence in the exercise of his authority over the others. Every case, in this respect, must depend upon its own circumstances."

It is urged by appellee's counsel that appellant's tenth instruction contains the same error as appellee's second instruction, before referred to, and it is insisted that the judgment can not therefore be reversed "where both parties submit the same instruction." Whether this conclusion be deemed correct or not, it is founded upon a misconception. The instructions referred to do not contain the same error.

Appellant's tenth instruction tells the jury, in substance, that the employe takes the risk of occasional negligence in fellow-servants, provided the master has exercised reasonable care in selecting them, and that if the injuries were caused by negligence of fellow-servants, the verdict should be for defendants.

The similarity between the two is that both refer to fellow-servants. One tells the jury that appellee is responsible for the acts of its representatives in charge of the work; the other, that appellee is not responsible for negligence of fellow-servants; but the former tells the jury to decide as a question of fact whether said employes were fellow-servants or representatives of the master, and does not advise them what in law constitutes the difference between fellow-servants and such representatives, nor how the rule is applicable to the facts as shown by the evidence. The jury are left to determine "whether the particular case falls within the definition" without having the definition; and this, the Supreme Court says, "it is essential they shall have."

It is urged that the error is merely theoretical; that we can not say the jury would have rendered a different verdict if properly instructed. We are aware that it is asserted that juries often disregard or fail to understand

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instructions, and render verdicts without reference thereto. This, if true, may be owing in part to a method of giving instructions in writing, as the statute requires, under which they frequently contain nice distinctions, not always easy of comprehension by the trained lawyer, and necessarily obscure to the average juror. But so long as written instructions are required, they must be reasonably accurate, and properly fulfill their office, and we can not presume they will not then be comprehended and regarded by jurors acting under the sanctity of an official oath.

In this case the evidence tends to show that the scaffold had answered the purposes for which it was erected. It was when the unusual strain was put upon it by six or seven strong men lifting upon the heavy balcony, which had been erected piece by piece, in order to put it into position, that the scaffold proved unequal to the burden thus imposed. The question is, therefore, whether or not the injury was caused by the negligence of fellow-servants of the deceased, under the rule of law applicable, whether it was owing to any faulty and negligent erection of the scaffold itself, and whether it was caused by negligence of an authorized agent of the master, arising out of and directly resulting from such authority. If the scaffold was adequate to the work for which it was originally erected, and which was contemplated by those who directed its construction and the selection of the material, and by the employer, the fact that it was not adequate to an extra strain, which was not contemplated, might not necessarily prove negligence in the defendant company.

With a sincere desire to expedite business of the courts and bring litigation to a conclusion as rapidly as is consistent with full and fair consideration of causes, after a careful consideration of the petition for rehearing in this cause and the subsequent motion by appellee's counsel, we can not say the error in the instruction referred to was not prejudicial. If it was, and it is, we think, evident that it may have been, the appellant is entitled to a new trial.

It is true that appellee was not required to offer an instruc-

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tion as to the relation of fellow-servants in this case. But the fact remains, that having done so, we can not disregard a failure to comply with the plain requirement of the law as interpreted by the highest tribunal of the State.

Inasmuch as there must be a new trial, we refrain from discussion of the evidence. For the error noted, the judgment of the Superior Court is reversed and the cause remanded.

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	80	499
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1. WORDS AND PHRASES — *Immediate Notice*.—The term “immediate notice” means notice within a reasonable time, and whether such notice was given is a question for the jury.

2. INSTRUCTIONS—*Insanity and Suicide—Precedents*.—The court recites the instruction in this case upon the questions of insanity and suicide, in the opinion, and approves the same, “finding no substantial error in any of them.”

3. PRESUMPTIONS—*In Favor of Sanity and Against Suicide*.—The legal presumption is always in favor of sanity and against suicide.

4. BURDEN OF PROOF—*Upon the Party Alleging Insanity*.—The law presumes the fact of sanity, and the burden is cast upon the party alleging insanity to establish it, by a preponderance of proof.

5. INSURANCE—*Presumption Against Suicide*.—Where the plaintiff makes a *prima facie* case that the death of the assured was occasioned by violent and external means, the legal presumption arises that it was accidental and not suicidal.

6. SUICIDE—*An Affirmative Defense*.—Suicide is an affirmative defense, and must be proved by a preponderance of the evidence.

7. PRACTICE—*Offers of Proof*.—Counsel have the right to make an offer of proof, for the two-fold purpose of informing the court of what is expected to be proved, and of preserving an exception to the exclusion of the offered evidence.

8. AD DAMNUM—*Objections that a Verdict Exceeds It, Must be Made in the Court Below*.—Objection that verdict exceeds the *ad damnum* must be made in the trial court; it can not be urged for the first time in the Appellate Court.

Assumpsit, on a policy of insurance. Trial in the Circuit Court of Cook County; the Hon. JOHN C. GARVER, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this

Court at the October term, 1898. Affirmed. Opinion filed March 16, 1899.

JOHN A. POST and O. W. DYNES, attorneys for appellant.

Definition of an accident. 3 Joyce on Insurance, Sec. 2863; Black's Law Dictionary, 15; Schneider v. Provident Life Ins. Co., 24 Wis. 28; Standard Dictionary (1896), 14; 1 Am. & Eng. Enc. of Law, 82; Langdon v. Bowen, 43 Vt. 512; Brown v. Kendall, 6 Cush. (Mass.) 292; Chase v. Barrett, 4 Paige (N. Y.), 148; Jones v. Woodhull, 1 Root (Conn.), 298; Brown v. Elliott, 17 N. J. Eq. 353; 7 Am. Law Review, 588; 69 Pa. St. 43; 1 Am. & Eng. Enc. of Law, 87, 88; Ripley v. Ry. Passenger Assurance Co., 2 Big. Cases, 738; Mallory v. Travelers' Ins. Co., 47 N. Y. 52; McGlinchey v. Fidelity & Casualty Co., 80 Me. 251; 2 Big. Life & Accident Insurance Cases, 596; Bouvier's Law Dictionary (Rawle's Revision), 61.

A plea of non-assumpsit is a sufficient plea in this case for the introduction of any and all evidence offered by the defendant. 4 Joyce on Insurance, Sec. 3691; O'Brien v. O'Brien, 75 Ill. App. 263; 2 Enc. of Pleading and Practice, 1027-8; Morgantown v. Foster, 35 W. Va. 337; 2 Beach on Insurance, Sec. 1319.

HARBERT, CURRAN & HARBERT and DAVID J. WILE, attorneys for appellee.

Plaintiff's *prima facie* case was made when she introduced the policy, proved premium payment, showed the death of assured by external, violent and accidental means, notice of death and proof thereof according to the policy. Continental Ins. Co. v. Rogers, 119 Ill. 474; Mut. Ben. L. Ins. Co. v. Robertson, 59 Ill. 124; Cronkhite v. Travelers Ins. Co., 75 Wis. 116.

Affirmative defenses must be specially pleaded. 4 Joyce, Ins., Sec. 3691; 11 Ency. Pl. & Pr. 422; Ind., etc., v. Rundell, 7 Ind. App. 426; Coburn v. Travelers Ins. Co., 145 Mass. 226; Mulry v. Mohawk Ins. Co., 5 Gray (Mass.), 541; Orrell v. Hampden Ins. Co., 13 Gray (Mass.), 431; Pierce v. Cohasset Ins. Co., 123 Mass. 572; Freeman v. Travelers

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Ins. Co., 144 Mass. 572; Standard L. & A. Ins. Co. v. Jones, 94 Ala. 434; Nat. Ben. Asso. v. Bowman, 110 Ind. 355.

Insanity, suicide, self-inflicted injuries resulting in death, and lack of immediate notice, are affirmative defenses. None of these is specially pleaded, therefore neither of them is available to appellant under the general issue standing alone. Whitlatch v. Fid. & Cas. Co., 78 N. Y. S. C. 146; 71 Hun, 143; Coburn v. Travelers Ins. Co., 145 Mass. 226, and cases therein cited; Mulry v. Mohawk Ins. Co., 5 Gray (Mass.), 541; Orrell v. Hampden Ins. Co., 13 Gray (Mass.), 431; Pierce v. Cohasset Ins. Co., 123 Mass. 572.

Sanity is presumed and the burden of proving insanity is on him who alleges it. The evidence to prove insanity must be sufficient to overcome the presumption of sanity and any evidence that may be produced in support of the presumption. Proof of sanity must prevail over any presumption of insanity based on the theory of heredity. Green v. Phoenix L. Ins. Co., 134 Ill. 310; Argo v. Coffin, 142 Ill. 368; Snow v. Benton, 28 Ill. 306.

In the absence of satisfactory proof as to the cause of a violent death, or as to death being accidental or suicidal, the presumption is in favor of the theory of accidental death. Bliss Ins., Sec. 367; May Ins., Sec. 325; 2 Biddle Ins., Sec. 842; 3 Joyce Ins., Sec. 2865; Conn. Mut. L. Ins. Co. v. Akens, 150 U. S. 468; Travelers Ins. Co. v. McConkey, 127 U. S. 661; Acc. Ins. Co. v. Bennett, 90 Tenn. 256; Keels v. Mut. Res. Assn., 29 Fed. Rep. 198; Mallory v. T. I. Co., 47 N. Y. 52; Conadeau v. A. A. Co., 95 Ky. 280; Washburn v. N. A. S. & Co., 10 N. Y. Supp. 366; Star Acc. Co. v. Sibley, 57 Ill. App. 315.

It is too late to raise for the first time in this court, an alleged error, which should have been, but which was not, embraced in the motion for a new trial. Nor can an objection on appeal be based upon grounds different from those stated below. C. & A. R. R. Co. v. Elmore, 32 Ill. App. 418; O. O. & F. R. v. McMath, 91 Ill. 104; Clause v. Bullock Ptg. Co., 20 Ill. App. 113; Hintz v. Graupner, 138 Ill. 158; C. M. B. Assn. v. Baldwin, 49 Ill. App. 203; Kelley v.

Shumway, 51 Ill. App. 634; Stuve v. McCord, 52 Ill. App. 331; Geist v. Pollock, 58 Ill. App. 429; Frame v. Murphy, 56 Ill. App. 555.

In the absence of satisfactory proof as to the cause of a violent death or as to the death being accidental or suicidal, the presumption is in favor of the theory of accidental death. Bliss Ins., Sec. 367; May Ins., Sec. 325; 2 Biddle Ins., Sec. 842; 3 Joyce Ins., Sec. 2865; Acc. Ins. Co. v. Bennett, 90 Tenn. 256; Keels v. Mut. Rec. Assn., 29 Fed. Rep. 198.

The presumption is against suicide in favor of death being accidental where the insured had disappeared and was thereafter found in the river. Mallory v. F. I. Co., 47 N. Y. 52; Conadeau v. A. A. Co., 95 Ky. 280; Washburn v. N. A. A., 32 N. Y. St. Rep. 34, 10 N. Y. Supp. 366, noted in 57 Hun, N. Y. 584; Star Accident Co. v. Sibley, 57 Ill. App. 315, citing Chi. R. R. Co. v. Hines, 132 Ill. 161.

MR. JUSTICE ADAMS delivered the opinion of the court.

The action in which the judgment appealed from was rendered was assumpsit on an insurance policy issued to Simon Weise, deceased, insuring him in the sum of \$5,000, "against bodily injuries sustained through external, violent and accidental means." The policy contains the following clause:

"If death shall result within ninety days from such injuries, independently of all other causes, the company will pay the principal sum of the policy to Minnie Weise, his wife, if surviving, or, in the event of her prior death, to the legal representatives of the assured." * * * "In case of injuries, fatal or otherwise, wantonly inflicted on himself by the assured or inflicted upon himself or received by him while insane, the measure of this company's liability shall be a sum equal to the premium paid, the same being agreed upon as in full liquidation of all claims under this policy."

The policy was issued subject to the following:

"5. Immediate written notice must be given said company at New York City, of any accident and injury for which a claim is to be made, with full particulars thereof,

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and full name and address of the insured. Affirmative proof of death, or loss of limb or of sight, or of duration of disability, must also be furnished to said company within two months from time of death, or of loss of limb or of sight, or of the termination of disability. Legal proceedings for recovery hereunder may not be brought till after three months from date of filing proofs at this company's home office, nor brought at all unless begun within six months from the time of death, loss of limb or sight, or the termination of disability. Claims not brought in accordance with the provisions of the clause will be forfeited to the company."

The declaration, as originally filed, after setting forth the policy and the conditions on the back thereof, proceeds as follows:

"And the plaintiff avers that, at the time of the making of the said policy, and from thence until the death of the said Simon Weise, as hereinafter mentioned, she was the wife of said Simon Weise, and the beneficiary mentioned in said policy; that on the fifth day of July, 1893, the said Simon Weise suffered bodily injuries, sustained through external, violent and accidental means, *to wit, by means of a pistol wound in the head, inflicted upon him by some person or persons unknown*, from which his death resulted on the day last aforesaid; and the plaintiff further avers that she is the legal holder of said policy; that immediately after the death of said Simon Weise, to wit, on the thirteenth day of July, 1893, she gave written notice to said defendant, at New York City, of the injury, of death, as aforesaid, of the said Simon Weise, with full particulars thereof, so far as known to her, and full name and address of the insured, and within two months of the date of said death, to wit, on September 1, 1893, did furnish to the said company affirmative proof of the death of said Simon Weise; nevertheless although the said Simon Weise, during his lifetime, kept and performed all things in said policy mentioned on his part to be kept and performed, and although the plaintiff has kept and performed all things in the said policy mentioned on her part to be kept and performed, and although more than three months have elapsed since the receipt by the defendant of the proof of death so furnished as aforesaid, yet the defendant has not paid to the plaintiff the amount of the said policy nor any part thereof, but refuses so to do, to the damage of the plaintiff of six thousand dollars, whereof she brings her suit," etc.

The appellant, May 8, 1894, pleaded the general issue and thirteen special pleas, and February 15, 1897, appellee filed a similiter to the plea of the general issue and replied to the special pleas. February 17, 1897, the following order was entered in the cause :

“On motion of D. J. Wile, Esq., it is ordered that leave be, and is hereby given him to enter his appearance as attorney for the plaintiff in said cause. On motion of plaintiff's attorney it is ordered that leave be, and the same is hereby given plaintiff to amend declaration filed in said cause *instanter*, and that the defendant's plea of general issue and replication filed herein stand as pleaded to the amended declaration filed in said cause.”

The amendment made was the striking out the words in italics in the above quotation from the declaration, namely, “to wit, by means of a pistol wound in the head, inflicted upon him by some person or persons unknown.”

The special pleas set up, among other defenses, that plaintiff failed to give immediate notice or to furnish affirmative proof of death within the time limited in the policy; that under the policy, the company's liability is limited to the premium paid, because assured wantonly inflicted upon himself the injuries from which he died, or were inflicted upon, or were received by him while insane, by reason whereof the liability of the company was thus restricted, etc.

Appellant's counsel now contend that the special pleas were eliminated by the order of February 17, 1897, apparently being of the opinion that such elimination is to appellant's advantage in respect to the question of the burden of proof on some of the issues involved.

We are of opinion that the amendment did not, in the least, require any change in either the general issue or the special pleas; that no order in respect to appellant's pleas was necessary, and that the order made on motion of appellee's attorney did not have the effect of eliminating the special pleas. This question, however, is immaterial in view of the fact that counsel for appellee agree that the cause may be considered as if the special pleas were, as contended

by appellant's counsel, eliminated by the order of February 17th, and also in view of the fact that no evidence offered by appellant was rejected because not specially pleaded.

The assured left his house July 5, 1893, between five and six o'clock in the morning; about eleven o'clock of the same day his body was found lying flat on its face in the water of Lake Michigan, between the breakwater and the shore, and between Fortieth and Forty-first streets, in Chicago. The water where the body lay was so shallow that the body rested partly on the bottom. It was first discovered by a stranger, who reported his discovery to a policeman. One could walk on stones, the surfaces of which were above the surface of the water, to where the body lay. A hat and coat were found lying on the stones above where it lay. The clothing was not torn nor disarranged, nor were there any indications of violence except the wound hereinafter mentioned. The day was bright and sunshiny, and the place where the body was found was about 100 feet from the tracks of the Illinois Central Railroad Company. The police took the body to the morgue, where it was discovered that there was a wound in the center of the frontal bone, which is described by the witnesses as a very small hole, such as might be caused by a bullet fired from a number 32 revolver. The direction of the hole was straight and at right angles with the plane of the frontal bone. It was probed, but not deep enough to find a bullet, if one was in it. The wound was clean and round—no ragged edges, a clean cut wound. There were no powder marks about the wound or on the face. After the wound was discovered and several hours after the body was found the policeman who removed the body to the morgue returned to the place where he found it, and, assisted by a boy about thirteen years old, searched about an hour for a revolver, but could not find any. When the body was found, the joints were flexible, and it appeared to have been in the water about an hour or two hours.

The appellee put in evidence the policy, a letter from appellee to appellant of date July 13, 1893, and an answer thereto, which letters are as follows:

"CHICAGO, ILL., July 13, 1893.

FIDELITY & CASUALTY COMPANY,
140 B'way, N. Y. City.

GENTLEMEN:—Simon Weise, insured under your Policy No. 314671, bearing date August 3, 1892, was found dead on July 5, 1893, from the effects of a pistol shot in the head. It is at present uncertain as to whether his death was the result of suicide or was received at the hands of some other person, though the verdict of the coroner's jury was, 'Suicide while temporarily insane.' I shall make further investigations and communicate with you.

Yours truly,
MINNIE WEISE."

"JULY 17, 1893.

MRS. MINNIE WEISE,

Care of Harbert & Daley, Chicago, Ill.

DEAR MADAM:—In re Simon Weise, Pol. 314671. We beg to acknowledge the receipt of your favor of the 13th inst., in the above matter, and to advise you that the matter has been referred to our Mr. Rivolta, at Chicago.

Yours truly,
ASS'T EXAMINER."

It is admitted that proof of loss was properly made, that the premium on the policy was paid and the policy issued by appellant. Appellee introduced evidence tending to prove that the appearance of the wound, its direction and the absence of powder marks around it and of burning at or near the edges of the wound, indicated that the bullet which made it was not fired at close range. The appellant introduced evidence tending to prove suicide and insanity, and appellee introduced evidence in rebuttal. The jury found the issues for the appellee and assessed her damages at the sum of \$6,125, and judgment was rendered on the verdict.

Appellant's counsel contend that the notice of the death of the insured sent to appellant on the eighth day after the death was too tardy, and not good under the policy. First, the notice was not objected to, and it is admitted in appellant's argument that there was no objection to the proofs of death. Secondly, immediate notice means notice within a reasonable time, and whether such notice was given is a

question for the jury. 4 Joyce on Ins., Sec. 3292; Ins. Co. v. Lewis et al., 18 Ill. 553; Ins. Co. v. Gould et al., 80 Ib. 388; People's Acc't Assn. v. Smith, 126 Penn. St. 317. There are numerous other cases to the same effect. Thirdly, the question whether proper notice was given, was submitted to the jury by appellant's first instruction.

Objections are made to instructions 1, 2, 3 and 5 for the plaintiff, which are as follows :

"1. The plaintiff, to make out her case under the pleadings, is only required in the first instance to introduce in evidence the policy of insurance sued on, and then to show that the premiums on the policy have been paid; that the assured came to his death by external, violent and accidental means, and that she has furnished to the defendant within the time limited in the policy the notice and the affirmative proofs of death, such as are required by the policy.

"If from the evidence the jury find these facts proved, then the plaintiff is entitled to your verdict for \$5,000, and interest at five per cent per annum, from December 8, 1893, unless one of the defenses urged by the defendant has been by it proved by a preponderance of the evidence. It is the defendant's contention that the plaintiff is not entitled to recover more than \$37.50, because it asserts that the contract of insurance of which the policy is the evidence, was violated by the assured and was not fulfilled on his part. In other words, the defendant claims, either that the assured committed suicide, or that, while insane, he received the injuries which caused his death.

"But the jury are instructed that each of these is an affirmative defense against which the plaintiff is not bound, in making out her case in chief, to introduce any evidence at all,

"It is upon the defendant that the law places the burden of proving one or the other of these defenses, as alleged in its special pleas, by a preponderance of the evidence, and the defendant must prove one or the other by such evidence and facts and circumstances in evidence as in your judgment outweighs the evidence of the plaintiff.

"The finding of the coroner's jury or inquest has been introduced in evidence, but it is not conclusive or decisive of the question whether or not the deceased, Simon Weise, committed suicide, or of the question whether or not he was insane at the time of his death. You may give to the finding of the coroner's jury such consideration as you think it

should receive in view of all the circumstances under which the finding was made. You should not determine or pass upon the question how the deceased came to his death, nor upon the condition of his mind at the time, without considering all the evidence, facts, and circumstances shown upon the trial, having a bearing on the question.

"2. You are instructed that the opinions of non-professional witnesses as to the mental condition of the insured in connection with statements of facts and circumstances within their personal knowledge upon which such opinions are based, are competent evidence; and in this case, you are at liberty to consider as evidence the opinions of witnesses who had opportunities of observing the conduct of the insured or of conversing with him shortly previous to his death.

"3. The jury are instructed that in order for the plaintiff to recover, it is not necessary that she should show by direct evidence the particular and specific cause of the death of Simon Weise, provided you believe from the evidence and the facts and circumstances in evidence that his death was produced either by drowning or by a fatal wound in the head, or by a combination of both of these causes, and provided you further find that Simon Weise did not commit suicide and was not insane at the time of his death.

"5. The law presumes every man to be and continue sane, or of sound mind, until the contrary is shown by the evidence. When insanity is set up as a defense in actions of this kind, the burden of proving it is upon the party alleging the insanity. So, in order for the defendant to prevail as to this issue, the defendant must prove such insanity by a preponderance of the evidence. In precisely the same way, where the claim of suicide of the deceased is interposed as a defense, the burden of proving such suicide is upon the defendant, and before the defendant can prevail upon that issue, it must prove such suicide by a preponderance of the evidence."

Appellant's counsel object to the first instruction because it informs the jury that it is incumbent on the defendant to prove that the assured committed suicide, or that he, while insane, received the injuries which caused his death. The argument of appellant's counsel proceeds on the hypothesis that suicide and insanity are not affirmative defenses; that it is not incumbent on the defendant to plead them; that, if specially pleaded, the burden of proving them by a pre-

ponderance of the evidence would be on the defendant; but that, if the defendant stands on the general issue only, this burden is not on him. After arguing that proof of insanity or suicide is admissible under the plea of the general issue, counsel say :

“ Being then admissible in evidence under a plea of non-assumpsit, it would be more surplusage to plead it specially, and the defendant would be foolhardy indeed to file special pleas which would have no other material effect than that of relieving the plaintiff of the burden of proof and saddling the same upon himself, and which would be held bad on general demurrer as amounting to the general issue.”

We dissent *in toto* from this theory of appellant's counsel. In his work on Pleading, Chitty says :

“ If the plaintiff allege a condition subsequent to his estate, he need not aver performance, but the breach must be shown by the defendant, and matter in defeasance of the action need not be stated; and, whenever there is a circumstance, the omission of which is to defeat the plaintiff's right of action, *prima facie* well founded, whether called by the name of a proviso or a condition subsequent, it must be in its nature a matter of defense, and ought to be shown in pleading by the opposite party.” 1 Chitty's Pl., 9th Am. Ed., 223.

“ When, however, the proviso in a written instrument is distinct from and not even referred to by the clause on which the debt is charged, it is considered matter of defeasance, etc., which ought to come from the other side, and then it need not be set forth by the plaintiff.” *Ib.* 310.

The provision in the policy on which the appellant relies, viz., that in relation to the injuries inflicted by the assured on himself, or received by him while insane, is an independent provision, distinct from the clause on which the debt is charged, and is not referred to by that clause, and it is also in defeasance of the action. The declaration is sufficient and is admitted so to be by appellant's plea of the general issue. It is not averred in the declaration, and is not necessary to be averred, that the assured was sane when he received the injury which caused his death, or that he did not commit suicide, and clearly it was not incumbent on appellee to prove matters not alleged in her declaration,

which is admitted to be and is sufficient. In *Coburn v. Travelers Ins. Co.*, 145 Mass. 226, the court say: "When a defendant intends to rest his defense upon a fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out in precise terms in the answer," citing cases. The court further say:

"Stipulations added to a principal contract which are intended to avoid the defendant's promise by way of defeasance or excuse, must be pleaded in defense, and must be sustained by evidence. They are in the nature of provisos."

See, also, 4 *Joyce on Ins.*, Sec. 3691. Appellee having made a *prima facie* case that the death of the assured was occasioned by violent and external means, the legal presumption arose that the death was accidental and not suicidal. *Star Accdt. Co. v. Sibley*, 57 Ill. App. 315; 3 *Joyce on Ins.*, Sec. 2865, and cases cited.

The legal presumption is in favor of sanity and against suicide. These propositions have been so frequently announced and so thoroughly established that they may be regarded as elementary, and it seems rather the province of a teacher in a law school than that of a court of review to cite authorities in support of them.

Appellee having made a *prima facie* case, it was incumbent on appellant to overcome the legal presumption by evidence in support of its defense of suicide, or that the assured received, while insane, the injury which caused his death, and this it was bound to do by a preponderance of the evidence.

In *Green v. Phoenix Ins. Co.*, 134 Ill. 310, the court say:

"The law presumes the fact of sanity, and hence the burden is cast upon the party alleging insanity to establish it by a preponderance of proof." See, also, *Argo v. Coffin et al.*, 142 Ib. 368, and cases cited; 4 *Joyce on Ins.*, Sec. 3775; *Egbers v. Egbers*, 177 Ill. 82.

In *Egbers v. Egbers*, which was a bill to set aside a will on the ground, among others, that the testatrix was of unsound mind when she executed it, the court say: "The law throws the weight of the legal presumption in favor of

sanity into the scale in favor of the proponents from which it necessarily results that upon the whole case, the burden rests upon the contestants to prove the insanity of the testatrix." The court further say: "There is the natural presumption that she was sane, which with all of proponents' evidence, must be overcome, and sufficient evidence adduced so that, upon the whole evidence, there is a preponderance in support of the allegation in the bill of her mental unsoundness before the will can be set aside on that ground." Suicide is an affirmative defense, and must be proved by a preponderance of the evidence. *Gooding v. Ins. Co.*, 46 Ill. App. 307; *Insurance Co. v. Hogan*, 80 Ill. 35; *Mallory v. Insurance Co.*, 47 N. Y. 54; *Insurance Co. v. McConkey*, 127 U. S. 661.

Many more cases might be cited in support of the proposition that the burden was on appellant to sustain by evidence the defense of suicide and insanity, or one of them, but to cite additional authorities would seem superfluous. Appellant's counsel, while admitting that in suits on ordinary policies of life insurance it may be necessary to aver and prove suicide or insanity, as the case may be, seek to distinguish between such cases and the present, on the ground that the present is a suit on an accident policy. We perceive no reason for such distinction.

Coburn v. Travelers Ins. Co., *supra*, *Keene v. Accident Ass'n*, 161 Mass. 149, and *Anthony v. Accident Ass'n*, 162 Id. 354, cases in which it was held that the burden is on the defendant to prove defenses such as are attempted in the present case, were all suits on accident policies.

Counsel further object to the first instruction because of its reference to special pleas. Even though the hypothesis that the special pleas were eliminated by the order of February 17th is true, the reference to them could not in the least prejudice appellant, because whether the defenses of suicide and insanity must be specially pleaded, or whether, as appellant's counsel contend, these defenses may be made under the general issue, the burden is equally on appellant to prove them by a preponderance of the evidence. If, as

we hold, it was necessary to plead specially the defenses mentioned, and if, as contended by counsel, the special pleas were eliminated by the order of the court, the fact that appellant was permitted to introduce evidence in support of these defenses under the general issue, did not relieve appellant of the burden of proving its affirmative defenses by a preponderance of the evidence.

The objection to instruction two is, that it permits the jury to consider the opinion of witnesses who had opportunities of observing the conduct of the deceased, irrespective of whether they availed of such opportunities by observation or conversation with the deceased. In view of the evidence of the witnesses, we think it impossible that the jury could have been misled by the instruction.

The objection to the third instruction is thus stated by counsel: "In this instruction the jury are told that they must find the issues for the plaintiff, if they believe that Simon Weise did not commit suicide and was not insane *at the time of his death*. Now the contract of insurance specifically stipulates that there can be no recovery if insured was insane at the *time of sustaining the injury* which caused his death." The evidence shows that the insured died instantaneously on receiving the injury, or within a very short time thereafter. He was found, as heretofore stated, face down in the water, with a hole through the frontal bone and brain. The objection necessarily assumes that while he may have been sane at the instant of death, he may, also, have been insane at the instant when he received the fatal wound. In other words, that the infliction of a wound such as that described, may have the effect of restoring an insane mind to sanity, may physically kill and mentally cure at one and the same instant. We think further comment on this objection unnecessary. Regarding many of the objections of appellant's counsel to the instructions as hypercritical, and not being "skilled to divide a hair 'twixt north and northwest side," we omit further specific comment on them. Suffice it to say, we find no substantial error in any of the instructions complained of by appellant's counsel.

The appellant requested nineteen instructions, all of which were given, and some of which are, in our opinion, more favorable for the appellant than warranted by law.

A statement made by Dr. Bert, witness for appellee, in writing, and produced, as appears from the evidence, before the coroner's jury, inconsistent with his evidence on the trial, was put in evidence by appellant, and the witness was permitted in answer to questions by appellee's counsel, to explain how he came to make such former statement and the circumstances under which it was made, he testifying, among other things, that he was not sworn as a witness at the inquest. It is objected that this was error. The contrary was held in *Accident Ass'n v. McKinney*, 57 Ill. App. 141, citing cases. After the cause had been argued to the jury, the court permitted appellee's counsel to offer, in the presence of the jury, to prove certain things by a witness who had previously testified in the case, which offer the court overruled. The permitting the offer to be made is complained of as error. Appellee's counsel, while the witness was previously on the witness stand during the trial, attempted to state what was expected to be proved by him, but the court, on objection made by appellant's counsel, refused to permit an offer of proof. Counsel have the right to make an offer of proof, for the two-fold purpose of informing the court of what is expected to be proved, and of preserving an exception to the exclusion of the offered evidence, and there was no error in permitting the offer to be made. *Gaffield v. Scott*, 33 Ill. App. 317; *Cook v. Husen*, 51 Ib. 269.

Counsel for appellant having caused the offer to be excluded by objecting to it when properly made on the trial, and in apt time, can not be heard to complain that the court eliminated its former error by subsequently permitting the offer.

The *ad damnum* is \$6,000 and the verdict \$6,125, and this is objected to as error. Appellant filed a motion in writing for a new trial, assigning reasons for the motion. It is not assigned as a reason that the verdict exceeds the *ad damnum*,

nor was that specific objection made in the trial court, and it can not be urged here for the first time. *Railroad Co. v. McMath*, 91 Ill. 104; *Accident Ass'n v. Froiland*, 161 Ib. 30.

Appellant's counsel, at the close of appellee's evidence in chief, and also at the close of all the evidence, moved the court to instruct the jury to find the issues for the defendant. Appellant waived the former motion by introducing evidence on the merits. In reference to the latter motion, appellant's counsel contend that the commission of suicide by the insured is established by a preponderance of the evidence. The court properly instructed the jury that appellee was required by law to establish her case by a preponderance of the evidence, before she could recover. This, of course, applied to appellee's case as stated in her declaration. Appellee made a *prima facie* case as stated in her declaration. Whether appellant overcame such *prima facie* case and the evidence introduced by appellee in rebuttal of the evidence in support of appellant's affirmative defenses, was a question for the jury, and one in regard to which we are of opinion reasonable minds might reasonably differ. Therefore the motion to take the case from the jury at the close of all the evidence, was properly overruled.

The trial in which the judgment appealed from was rendered, was the second trial of the cause; the first was in the March term, 1894, in which the jury found for appellee and assessed her damages at the sum of \$5,895.18. We see no reason to suppose that the result of a third trial would be different, except, perhaps, as to the amount of the verdict.

We find no reversible error in the record, and the judgment will be affirmed.

Clara Overtoom, Adm'x, v. Chicago & E. I. R. R. Co.

1. **RAILROAD COMPANIES—Operation of Trains Over Street Crossings in Cities.**—The degree of diligence required of a railroad company in the operation and running of its trains over street crossings, especially in and about busy cities, depends upon the circumstances of each case, and whenever it is alleged that a crossing is in a populous neighborhood and much used, evidence tending to support such allegation is proper and competent. And this is true at common law, independently of statutes or ordinances regulating the rate of speed of trains.

2. **JUDICIAL NOTICE.—Matters to be Proved.**—Courts and juries are not presumed to know judicially the varying characteristics and conditions of the numerous intersections of streets and railway tracks in and around a large city, and evidence of such condition is proper and competent as tending to shed light upon the care and caution to be exercised by a railroad company in running its trains.

3. **EVIDENCE—Speed of Trains.**—The fact that a witness is not able to testify how fast or how slow a train was running should not preclude him from testifying whether the train was running fast or slow. While such evidence is competent, its weight is for the jury.

4. **SAME—Competency of Shorthand Notes.**—The notes of a stenographer taken at a coroner's inquest are not admissible as the best evidence of what occurred at such inquest.

5. **SAME—Testimony Taken before a Coroner.**—The deposition of the witness taken by a coroner and reduced to writing by him, and filed as provided by statute, is the best evidence of what a witness testified to upon an inquest held under the statute by such coroner.

Trespass on the Case.—Death from negligent act. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for defendant; appeal by plaintiff. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed March 14, 1899.

CHESTER FIREBAUGH, attorney for appellant.

WILL H. LYFORD, J. B. MANN and ALBERT M. CROSS, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court. Appellant sued as administratrix of the estate of Adrian Overtoom, deceased, to recover damages for the alleged wrongful killing of the said deceased.

The accident happened about dusk, in the evening of April 20, 1895, at the intersection of Michigan avenue with appellee's tracks, between 115th street and 116th street, near Kensington station, in the city of Chicago.

At that point there were three tracks running in a southeasterly and northwesterly direction, and Michigan avenue, being a north and south street, was crossed by the tracks diagonally.

The easternmost (or northernmost) track was a side track, the middle track was the main south-bound track, and the westernmost (or southernmost) track was the main track for north-bound trains. The business center of Chicago being far to the north of the place in question, most of the witnesses speak of the tracks as running north and south, although in fact it is Michigan avenue, and not the tracks, that pursues that course.

The home of the deceased was north of the tracks, on 115th street near Michigan avenue. After supper he left his house and went south on Michigan avenue. When he reached the crossing, a long and heavily loaded freight, or coal train, moving slowly, was either passing upon the crossing, or about to pass from the southeast, upon the north-bound track. He entered upon the crossing, passed over the side track and got upon the middle or south-bound track, when another train, consisting of a locomotive and caboose, came down from the north, upon the south-bound track, and struck and killed him.

From the testimony of the only witnesses who saw the deceased at about the instant he was hit, it is not clear whether the freight train was upon the crossing when he entered upon it, and prevented him from going across, and that he stopped and was standing still upon the south-bound track waiting for the freight train to pass upon the north-bound track, or was walking diagonally across the south-bound track, upon which he was hit, looking backwards at the freight train approaching from the other direction upon the north-bound track.

Bisping, a witness for the plaintiff, testified he saw the

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train strike him; that "he stood right on the track; * * * he was standing on the track waiting for the freight train to pass."

Fairman, for the defendant, testified that he was the locomotive engineer running the engine that struck the deceased; that he was about seventy-five feet from Overtoom when he first saw him; that he was "coming from the east sidewalk, walking in a diagonal course across the street. He was looking eastward when we approached the crossing, at a train coming up the grade from the south."

Brown, a telegraph operator in appellee's employ, testified for appellee: "The engines met at the crossing. * * * Saw him a few seconds before he was struck; * * * he passed under the arm of the gate across the sidewalk. He was struck by the train from the north. I saw him struck. The north-bound train was then about the crossing." The evidence as to whether the gates were up or down, when deceased passed upon the tracks, was conflicting. There was evidence enough for the jury to find either way upon.

The pleas were, simply, the general issue of not guilty. The killing of the deceased was admitted by the appellee at the trial, so that the issues submitted to the jury were confined to the questions of negligence by appellee and contributory negligence by the deceased.

Both of these questions were settled by the verdict of not guilty in favor of appellee, upon conflicting evidence, and if appellant had a fair trial, and there are no errors of law of sufficient magnitude to require a reversal of the judgment, it must stand.

It is urged that the court erred in excluding certain evidence offered by the appellant.

The first count of the declaration charged the negligence of the appellee to consist in running its engine and train of cars over the crossing in question at an unusual and unreasonably fast and unsafe rate of speed, said crossing being then and there in a very thickly settled and populous part of the city, and being then and there very much traveled.

The appellant testified that she had resided with the de-

ceased, her husband, in the same house, about a block and a half from the crossing, for about thirteen years, and was acquainted with the region and the crossing. Upon her direct examination she was asked to state whether or not Michigan avenue was a much traveled highway at that time, and a general objection to the question was sustained.

After some colloquy between the court and counsel for appellant, wherein the latter contended that it was competent to show, and that he wished to show, that the neighborhood was populous, and many people were going along the avenue all the time, the court ruled it was "wholly immaterial whether there were forty or one. It was a public highway, and everybody had a right to be on it that wanted to," and refused to allow the evidence to be given.

Later, upon her re-direct examination, a like attempt by a similar question was made, and an objection to the question, upon the ground of immateriality, was sustained—the judge saying in a continuous remark, shown in the bill of exceptions as follows, "I think it is wholly immaterial, but if counsel think it important, I will let him prove it. Objection sustained."

From the context it is plain, we think, that although the court did say that appellant might prove what he was attempting, the court immediately changed back to its earlier holding, and denied opportunity to appellant to make the proof. This is made more apparent by subsequent rulings by the court in sustaining general objections to three like questions put to three other witnesses, one upon direct examination and two upon re-direct examination.

As to the rulings upon the questions put to the two witnesses upon their re-direct examination, it is said by appellee that the rulings were proper, because of the rule of evidence that the re-direct examination of a witness must be confined to matters brought out on cross-examination. But that rule is one that does not execute itself. It is required that the objection should be made upon that ground. Here, the objections were mere general ones.

It is further insisted by appellee that evidence on the point was really put into the case because a witness who

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was questioned concerning the populousness of the region was allowed to state that "right by the crossing there are not many people living, but all around there are. Within a block away it is pretty thickly settled, and was so in the month of April, 1895."

Which answer, being made after his testimony that "there was a good deal of travel on Michigan avenue," was, upon motion by appellee, struck out.

It appears from the evidence that appellee maintained gates at the crossing, and there was a conflict in the evidence as to whether the gates were up or down at the time the deceased entered upon the tracks. There was also a conflict in the evidence as to the rate of speed at which the train that struck and killed the deceased was running at the time he was hit.

In some of the counts of the declaration, negligence in the omission to properly operate the gates, and in the rate of speed at which the train was run, were alleged, and various rulings of the court concerning evidence offered in support thereof are complained of.

These rulings last referred to, may be properly considered in connection with the ones previously mentioned concerning the offered proof of the populousness of the neighborhood and the amount of travel over the crossing.

The degree of diligence required of a railroad company in the operation and running of its trains over street crossings, especially in and about busy cities, depends upon the circumstances of each case, and whenever it is alleged that the crossing is in a populous neighborhood and much used, evidence tending to support such allegations is proper and competent. And this is true at common law, independently of statutes or ordinances regulating the rate of speed of trains. Such regulations are usually prohibitory of a rate of speed greater than that which is prescribed, but are not permissive of such a rate under all circumstances. The safety of the public may frequently require trains to run at less speed than the statute or ordinances prohibits the excess of. Neither courts nor juries are presumed to know judicially of the varying characteristics in such respects of the

numerous intersections of streets and railway tracks in and around a large city. Proof thereof is therefore necessary, and, because necessary, is proper and competent under appropriate allegations. The tendency of such proof is to shed light upon the question of the care and caution exercised by the railroad company in running the train that caused the injury.

These views are supported by numerous decisions, among which are *Wabash R. R. Co. v. Hanks*, 91 Ill. 406; *C. & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 132; *C. & I. R. Co. v. Lane*, 130 Ill. 116; *E. J. & E. Ry. Co. v. Raymond*, 148 Ill. 241; *St. L., A. & T. H. R. R. Co. v. Odum*, 52 Ill. App. 519; *C. & E. I. R. R. Co. v. Johnson*, 61 Ill. App. 464.

Two of appellant's witnesses were asked whether the train was going fast or slow, and the answers that "it was going very fast," by one, and, "running pretty fast," by the other, were, upon motion, struck out.

We infer from the briefs that this ruling was made upon the mistaken notion that because the witnesses were inexperienced in observing the speed of trains, and could not state, in miles per hour, the rate at which the train was going, they were incompetent to testify whether the train in question was going slow or fast.

It was held, in *I. C. R. R. Co. v. Ashline*, 171 Ill. 313, as follows :

"The fact that a witness might not be able to testify how fast or how slow a train was running should not preclude him from testifying whether the train was running fast or slow. While such evidence would be competent, what weight should be attached to it would be for the jury."

But we can not regard the error in striking out the answers as harmful. The witness whose answer, upon direct examination, that the train was "running pretty fast," was struck out, testified, upon cross-examination, that the train "was coming just a-flying through there," and another witness testified, without objection, that the train "was going very fast," and several testified to a high rate of speed, in specified miles per hour.

Nor do we regard it as serious error that the court refused

to allow another witness to testify as to the height of a trolley wire from the ground, it having been testified that the deceased was thrown into the air as high as a trolley wire on the street car line at that point.

While such evidence might have tended to show that the train was moving at a high rate of speed, it would have been merely cumulative on the point of speed, and probably the jury were not ignorant of the usual height of trolley wires.

For the purpose of impeaching one of appellant's witnesses upon the subject of the position and operation of the gates, appellee produced as a witness a stenographer in appellee's service, who took down shorthand notes of the testimony given at the coroner's inquest, over the body of the deceased, and read to the jury from such notes, over the objection of appellant that such was incompetent and not the best evidence, certain questions put to the witness at the inquest, and his answers thereto. The only foundation for this evidence, and the only method of qualifying this witness, or of showing the authenticity of the notes he read from, was, as shown by the abstract, as follows:

"Am in the law department of the Chicago & Eastern Illinois Railroad. Have been there for two and one-half years. Have worked at phonography, taking shorthand notes about five years. Was present at the coroner's inquest which was held over the body of Overtoom at Kensington, April 23, 1895, and took down shorthand notes of the testimony given there. I have the notes of the testimony here with me.

Q. Will you produce them?
(Witness produces note book.)"

Upon cross-examination this witness testified:

"I can not say that I have an independent recollection of what occurred at the inquest, that is, independent of my notes."

The witness nowhere says that the notes are correct, nor even that they are in the same condition as they were left in by him at the close of the inquest.

We are unable to conceive of any ground upon which the admissibility of the notes can rest. The trial judge justified

his ruling by the following remark: "My impression is that this is much better than testifying from memory."

Counsel for appellee gives a more specious reason for upholding the ruling, in that it is proper to show a witness has made statements out of court different from those made in court, and that this may be shown by the evidence of any person who heard the statements made elsewhere. But this reason has no applicability, because the witness did not pretend to testify from recollection. He merely read from notes made by him in a book produced by him, without any recollection independent of the notes, and with nothing to show that the notes correctly and truly expressed what occurred at the inquest. It was not the testimony of a witness that he had heard the other at another time make a different statement, that was admitted, but it was merely some unauthenticated notes of what the earlier statement was that was admitted.

There is still a broader ground why the contents of the notes were inadmissible, and that is because the deposition of the witness taken by the coroner and reduced to writing by him, and filed as provided by the statute, was the best evidence. For a discussion of this subject, see *United States Life Ins. Co. v. Vocke*, 129 Ill. 557, and *People v. Devine*, 44 Cal. 452, quoted from on page 566.

Some flippant remarks by the trial judge, in the presence of the jury, are complained of as prejudicial, but we do not think they were effective upon the result.

In the matter of instructions we find no substantial error.

Although there was error in the rulings in the respects indicated, the majority of the court are of opinion that such errors are applicable to and affect only the question of the negligence of the appellee, and in no substantial manner touch the question of contributory negligence by the deceased; that under the rule that every intendment must be given in favor of the verdict of a jury upon conflicting evidence, we must presume that the jury found the deceased was guilty of contributory negligence, and especially so where, as here, there was so much evidence which, with the

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legitimate inferences to be drawn therefrom, tended to show that had the deceased been in the exercise of ordinary care for his own safety, he would not have come to his death.

The judgment of the Superior Court will be affirmed.

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1. PRACTICE—*Waiving of a Ruling on Demurrer*.—Taking leave to file an additional plea, without electing to stand by the plea to which the demurrer was sustained, is a waiver of all right of exception to the ruling of the court on the demurrer.

2. STATUTE OF FRAUDS—*Must be Specially Plead*ed.—The question as to whether a promise is within the statute of frauds can be raised only by special plea.

3. SAME—*Discharge of the Original Debtor Unnecessary*.—It is not necessary to the validity of a promise made for the benefit of a third person that the original debtor should be discharged.

4. CONSIDERATION—*Agreement for Forbearance*.—An agreement of forbearance to sue is a sufficient consideration to support a promise.

5. PARTIES—*Who May Sue*.—The party for whose benefit a promise is made, may sue for its breach.

Assumpsit, on promises. Tried in the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Finding and judgment for plaintiff; appeal by defendants. Heard in this court at the October term, 1898. Affirmed. Opinion filed January 26, 1899. Rehearing denied March 14, 1899.

FRANK A. MOORE, attorney for appellants.

CHURCH, McMURDY & SHERMAN, attorneys for appellee.

There is no doubt that promises by a third party to pay a debt for which another is liable, whether such promise be in writing or not, must, like all other promises, be supported by a sufficient consideration. That mere forbearance to sue is a sufficient consideration to support a contract, including contracts to pay another's debt, is a familiar proposition, recognized and applied by numerous authorities. *Morgan v. Park Nat. Bank*, 44 Ill. App. 582; *Belford v. Beatty*, 46 Ill. App. 539; *Webbe v. Romona Stone Co.*, 58 Ill. App. 222; *Worcester Nat. Bank v. Cheney*, 87 Ill. 608.

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Where one enters into a simple contract with another for the benefit of a third, such third person may maintain an action for breach, and such contract is not within the statute, citing authorities. *Wilson v. Bevans*, 58 Ill. 232.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment for \$216.67, rendered in favor of appellee in an action of assumpsit by it against appellants. The declaration contained, originally, two special counts and the common counts, but on motion of appellee the common counts were stricken out.

Appellants filed the general issue and a special plea of the statute of frauds, to which latter plea a demurrer was sustained, and leave was given to appellants to file an additional plea, which leave they did not avail of, and the case was tried on the general issue only. The cause was tried by the court, without a jury, by agreement of the parties.

Appellants' counsel, in their argument, say, "Defendants stood by their demurrer," but the record does not so show. On the contrary, the record only shows that, on the sustaining of the demurrer, leave was given to defendants to file an additional plea within five days.

We are of opinion that the taking leave to file an additional plea, without electing to stand by the plea to which the demurrer was sustained, was a waiver of all right of exception to the ruling of the court on the demurrer. *Dickhut v. Durrell*, 11 Ill. 72, 83.

This, if we are correct in our opinion, eliminates from consideration the question whether the promise is within the statute, because the common counts being stricken from the declaration, that question could only be raised by special plea. *Deniston v. Hoagland*, 67 Ill. 265; *Gordon v. Reynolds*, 114 Id. 118.

But inasmuch as counsel for both parties have devoted much of their argument to the question whether the promise sued on is within the statute of frauds, we have fully considered the question, and are clearly of the opinion that it is not, so that the sustaining the demurrer, even though erroneously, did not operate to the prejudice of

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appellants. The material facts of the case are as follows: George D. Turner and Paul Dickinson were partners in the foundry business and owned two plants and the land on which they were situated. The land where one of the plants was situated was known as the Hoyne avenue property, and that on which the other was situated, as the Hanson Park property. About October, 1895, they agreed to sever their relation, and divide the property, Turner taking the Hanson Park property, and Dickinson the Hoyne avenue property. The latter property was incumbered, but the former not. Turner and Dickinson appear to have been the owners of shares of stock of appellee, the monthly dues on which, payable to appellee, amounted to \$216.67. To secure payment of their monthly dues, George D. Turner, Paul Dickinson and Edward Dickinson, executed to appellee three bonds, in penalties, respectively, of \$9,200, \$800, and \$10,000, and, as collateral security, Paul Dickinson and George D. Turner each transferred to appellee 100 shares of appellee's stock, or 200 shares in all, the bonds being conditioned for the payment of the monthly installments which should become due on the stock, fines, etc. To further secure payment of the monthly dues or installments payable in respect of the stock, Paul Dickinson executed to appellee two mortgages on part of the Hoyne avenue property, and George D. Turner one mortgage on part of the same property.

Upon the division of the property between Turner and Dickinson, the former agreed with Dickinson that he, Turner, in consideration of the relinquishment by Dickinson of all interest in the Hanson Park property, would pay the amounts secured by the mortgages, in pursuance of which agreement Turner, October 4, 1895, executed to Dickinson a note for \$11,000, due six years after date. It is stated in the note that it is given as collateral security, is not negotiable, and is subject to the terms of a trust deed of even date therewith. Turner and his wife, October 4, 1895, executed to Robert McMurdy, as trustee, a trust deed of the Hanson Park property, to secure payment of the note above mentioned, reciting that the note was given as collat-

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eral security for the payment of the money secured to be paid by the three mortgages heretofore mentioned, and providing that if the appellee should file a bill to foreclose the mortgages, the note should thereupon become due and payable, but that no proceedings should be instituted for the foreclosure of the trust deed within four months from its date, etc.

After the execution of the trust deed Turner conveyed the premises therein described to the Garden City Foundry Company, a corporation, which company became insolvent and made a voluntary assignment in the County Court, and such proceedings were had in the matter of the assignment that the property was advertised for sale by the assignee. In the meantime monthly installments to the amount of \$3,965.10, payment of which to appellee was secured by the three mortgages, had fallen due and were unpaid, and appellee had filed a bill to foreclose the mortgages. More than four months from the date of the trust deed had elapsed and Paul Dickinson had, by the terms of the trust deed, the right to file a bill for its foreclosure. While matters stood thus John Chapman, of the partnership firm of Wickham & Chapman, engaged in the foundry business in Springfield, Ohio, came to Chicago for the purpose of establishing in Chicago a branch of his firm's business. He saw the Garden City Foundry plant, situated on the property described in the trust deed, and was desirous of bidding for and purchasing the property at the assignee's sale. Prior to the bidding, however, he called on Dickinson and one of his solicitors for information in respect to the mortgages and the trust deed, and what was due on the mortgages, etc. Appellee claims that the result of these interviews was that Chapman agreed with Dickinson that if he, Dickinson, would not bid for the property at the assignee's sale he, Chapman, in case he should purchase the property, would pay to appellee the amount of installments then in arrear, namely, \$3,965.10, and \$150 as attorney's fees, and would also pay all future installments as they should become due until the stock matured, not, however, to exceed \$11,000, inclusive of all past payments; Dickinson to have

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the bill to foreclose the mortgages dismissed, and not to foreclose the trust deed. Dickinson refrained from bidding at this sale; Chapman bid in the name of Wickham & Chapman, and the property was sold to him on his bid, and the assignee executed a deed to Wickham & Chapman. The property was sold subject to the Turner trust deed. Chapman paid \$3,965.10, the amount of unpaid dues on the shares of stock, and \$150 attorney's fees. Dickinson, on such payment being made, procured the dismissal of the bill to foreclose the mortgages, and did not file a bill to foreclose the trust deed or declare the amount secured by it due, as by its terms he had the legal right to do.

Assuming, for the present, that appellant Chapman agreed as claimed by appellee, we can not concur in the contention of appellants' counsel that the undertaking of appellants was without consideration. We are of opinion that there was ample consideration for their undertaking. They purchased the property subject to the terms of the trust deed, which required the owner of the property to pay all money, the payment of which was secured by the mortgages. By the terms of the mortgages all the money secured to be paid became, on default in the payment of any installment, due and payable at the option of appellee, the mortgagee. The filing of the bill to foreclose the mortgages was an exercise of that right of option, and on its being filed all installments, or monthly dues in respect to the stock, became at once due and payable. In addition to this, four months having elapsed since the date of the Turner trust deed and a bill having been filed to foreclose the mortgages, Dickinson, by the express terms of the trust deed, had the right to foreclose it, in which case he was in a position to obtain a decree for the amount of all installments due or to fall due in respect of the shares of stock not in excess of \$11,000, including all payments theretofore made. The benefit then to accrue to Wickham & Chapman from Dickinson's agreement was that they would thereby be able to pay the then future monthly dues or installments on the shares of stock as they should fall due

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monthly, instead of being compelled to pay them all at once, and also would save the expense attending a foreclosure of the trust deed.

An agreement of forbearance to sue is a sufficient consideration to support a promise. *Browne on Stat. of Frauds*, 4th Ed., Sec. 190; *Schwarze v. Greenbaum*, 58 Ill. App. 221; *Cornell v. Gen. Electric Co.*, 61 Ib. 325; *Underwood v. Hossack*, 38 Ill. 208; *Austin v. Bainter*, 50 Id. 308.

And the party for whose benefit the promise is made may sue for its breach. *Eddy v. Roberts*, 17 Ill. 505; *Wilson v. Bevans*, 58 Ib. 232; *Dean v. Walker*, 107 Ib. 540.

The promise in question was for the benefit of appellee. It obtained payment of the installments then due, and further personal security for the payment of future installments without further litigation. It is not, as appellants' counsel contend, necessary to the validity of the promise that the original debtor shall be discharged. *Browne on Stat. of Frauds*, 4th Ed., Sec. 194; *Borschenius v. Canutson*, 100 Ill. 82.

The evidence shows that Wickham & Chapman, after payment of the installments in arrear, took possession of the property and operated the plant, made two monthly payments of \$216.67 each, and March 20, 1897, closed the plant and moved away the machinery and fixtures.

Counsel for appellants contend that, even though it be held that the promise was made by Chapman, Wickham is not bound. This is hardly consistent with the statement in the argument of appellants' counsel that "Mr. Chapman on the part of himself and partner, came here from Ohio to purchase this property," nor with the facts that the property was purchased for the partnership business of Wickham and Chapman, and in their names, and that the deed ran to them as grantees, and the property was actually used in and for the partnership business.

There is some conflict in the evidence as to whether Chapman promised to pay future installments, but, after considering all the evidence, our conclusion is that the court was fully warranted by it in finding for appellee. It cer-

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tainly can not reasonably be said that the finding is manifestly against the weight of the evidence, which would have to be the case to justify a reversal.

The judgment will be affirmed.

West and South Towns St. R. R. Co. v. Edward B. McKey, Receiver, etc.

1. APPELLATE COURT PRACTICE—*Duty to Consider Exceptions.*—Under Section 60 of the Practice Act it is the duty of the Appellate Court to consider exceptions which relate to the receiving of improper or rejecting proper evidence, or to the final judgment of the court, the trial being before the court without a jury.

2. PARTIES—*Who Are Not Necessary in Insurance Cases.*—In a proceeding under the insurance act for the purpose of declaring the charter of a mutual insurance company forfeited, for its dissolution, the appointment of a receiver, winding up its business, etc., a policy holder in the company is not a necessary party.

3. PRACTICE—*Winding up the Affairs of a Mutual Insurance Company—Parties.*—In a proceeding under Chap. 78 R. S. entitled "Insurance" to wind up the affairs of a mutual insurance company, members of such company are not necessary parties.

Proceedings to Wind up the Affairs of a Mutual Insurance Company.—Trial in the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Decree for complainant; appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed February 9, 1899. Rehearing denied March 2, 1899.

LYMAN N. PAINE, attorney for appellant.

NEWMAN, NORTHRUP & LEVINSON, attorneys for appellee.

MR. PRESIDING JUSTICE WINDES delivered the additional opinion of the court upon petition for rehearing.

By petition for rehearing in this case, counsel for appellant has called our attention to an inadvertence in its decision. Because there was no exception taken to the judgment and no error in the common law record, we held there was nothing for us to consider. On further consideration and examination of the record, we think this was not strictly accurate, though perhaps justified by some of the cases cited.

Section 60 of the Practice Act makes it our duty to

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consider exceptions which relate to the receiving of improper or rejecting proper evidence, or to the final judgment of the court, the trial being before the court without a jury. It appears that the trial court admitted in evidence over the objection of appellant the transcript of a record of the Circuit Court of Cook County, showing the filing of a bill by numerous complainants, members and owners of the assets of the Illinois Mutual Fire Insurance Company, a corporation organized to do an insurance business under the laws of the State of Illinois upon what is commonly known as the mutual plan, for the purpose of declaring its charter forfeited, for the dissolution of the corporation, appointment of a receiver, and winding up its business; also orders appointing appellee as receiver for the assets of the corporation, finding its insolvency, the amount of its assets and liabilities, and directing the receiver to assess each member of the company, including appellant, certain amounts, specifying same, and to collect such assessments. The objection to this evidence is that the order for assessments was in no way binding on appellant (who was a policy holder in the company), because it was not a party to the proceeding. The same question is presented by three propositions of law submitted by appellant, and which were refused by the court. An examination of the bill offered, shows that the proceeding was one under the insurance act. Hurd's Stat., Ch. 73, Sec. 2 *et seq.*, and not under Section 25 of the General Corporation Act. This being so, the contention of appellant can not be sustained. Under the insurance act, appellant is not a necessary party. The evidence was properly admitted. *Great Wes. Tel. Co. v. Gray*, 122 Ill. 630; *Ward v. Farwell*, 97 Ill. 593; *Mallen v. Langworthy*, 70 Ill. App. 376.

The case of *Farwell v. Great Wes. Tel. Co.*, 161 Ill. 566, relates to a proceeding under Section 25 of the General Corporation Act, which was enacted prior to the Insurance Act, and does not control in the case at bar.

This disposes of all the questions which we should consider on this record, and the petition for a rehearing is denied.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—NOVEMBER TERM, 1898.

City of Marshall v. Cleveland, C., C. & St. L. Ry. Co.

1. **DEMURRER—To Pleas Can Not be Carried Back over the General Issue and Similiter.**—The court can not carry a demurrer to a plea back over the general issue and similiter thereto.

2. **EXCEPTIONS—Of Plaintiff, When Not Necessary.**—It is not necessary for the plaintiff to except in order to preserve his right to call in question, in the Appellate Court, the act of the trial court in overruling a demurrer and entering judgment for the defendant because of pleas unanswered.

3. **JUSTICE OF THE PEACE—Weight of Decision.**—A decision of a justice of the peace adverse to the validity of a city ordinance for the violation of which a suit was pending before him has no force except as to that particular suit.

4. **PLEAS—When Bad on Demurrer.**—A plea which professes to answer the whole declaration, but answers only a part, is bad on demurrer.

5. **CITY COUNCIL—Agreement to Release from the Penalty for Violating an Ordinance, When Void.**—While a city council can, by agreement, release a defendant from the penalty for violations already committed, an agreement allowing a party to violate a city ordinance *ad libitum* and tying the hands of a future council against prosecution, is void.

Debt, to recover penalty for violation of an ordinance. Trial in the Circuit Court of Clark County; the Hon. HENRY VAN SELLAR, Judge, presiding. Verdict and judgment for defendant. Appeal by plaintiff. Heard in this court at the November term, 1898. Reversed and remanded. Opinion filed February 7, 1899.

E. D. JONES, THOS. ORNDORFF, and F. W. DUNDAS, attorneys for plaintiff in error.

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The decision of a justice of the peace as to the validity of a city ordinance, is of no force except in so far as it relates to the particular suit in which such decision was rendered.

A plea must be true and certain; it must answer the whole declaration; where the court can judicially determine from its face that it is false, it will be bad upon demurrer. 1 Chitty's Pleadings, 13th Am. Ed., 521, 523.

A plea must answer the whole declaration; all that it assumes to answer. 1 Chitty's Pleadings, 13th Am. Ed., 523.

A plea which professes to answer the whole declaration, but answers only a part, is bad. Id. 524.

ROBERT E. HAMILL, attorney for defendant in error, contended that where a plaintiff demurs to several pleas and the demurrer is overruled and plaintiff declines to reply, the judgment will not be reversed if any one of the pleas be good. Puckett v. Pope, 3 Ala. 552; Firemen's Ins. Co. v. Cochran, 27 Ala. 228; Jesse v. Cater, 28 Ala. 475.

Where several pleas are filed, if any one of them is good, a demurrer directed indiscriminately against all should be overruled. 6 Encyl. Pleading and Practice, 305. (See note 2 and cases collected.)

Where there is a general demurrer, if any one of the pleas be good, the demurrer must be overruled. Stacy, Adm., v. Baker, 1 Scam. 417.

The same rule of law applies to declarations. Where a general demurrer is filed to a declaration, consisting of several counts, if either of the counts be good, the demurrer must be overruled. Cowles v. Litchfield, 2 Scam. 357.

The pleas set up that the several judgments were rendered in contested cases shortly after the alleged ordinance went into operation and effect and that the plaintiff failed to prosecute an appeal from such judgments. He therefore was estopped, as a matter of law, by the record and the former adjudication against the validity, force and effect of the ordinance. It is wholly immaterial that this court was a justice of the peace. The point has been expressly decided in this State. T. H. & I. R. R. v. The People, for

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use, 41 Ill. App. 513; Herman on Estoppel, Vol. 1, Par. 245; Markley v. People, 171 Ill. 262; Crosby v. Gipps, 16 Ill. 352; 21 Am. & Eng. Encyl. of Law, 229, 230.

A judgment on the construction of a by-law is conclusive. *Cauhape v. Parke*, 46 Hun (N. Y.), 306.

Where action for failure to provide a crossing had resulted for defendant, another action could not be maintained to compel it to provide a crossing. *Bettys v. C., M. & St. P. Ry. Co.*, 43 Iowa, 602.

MR. JUSTICE HARKER delivered the opinion of the court.

This was an action of debt brought by the city of Marshall against the C., C., C. & St. L. Ry. Co. to recover the aggregate amount of the penalties for two hundred and seventy days' consecutive violation of an ordinance of the city requiring a flagman to be kept at certain street crossings within the city.

The declaration recites the passage of an ordinance by the city council, in June, 1893, requiring all railway companies with tracks passing through the city to place and keep a flagman at all such street crossings where the city council should deem it necessary to the safety of the traveling public, under penalty of ten dollars per day for each day's failure therein after sixty days' notice of a resolution of the council designating the particular street crossings where such flagman is needed.

The declaration further recited that on the 3d of February, 1896, the city council passed a resolution designating the crossing of defendant's railroad over Cumberland and Washington streets at places at which the defendant should station and maintain a flagman, and on the next day caused a copy of the resolution to be served on the defendant; that upon the 16th day of August, 1896, and for every day thereafter until the 17th day of May (in all 270 days), the defendant refused and neglected to keep a flagman at said crossing, and that owing to such refusal an action had accrued to the city for which it brought suit to recover \$2,700.

Defendant first filed a plea of the general issue, upon

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which issue was joined by the plaintiff. It then filed six special pleas, to which the plaintiff demurred. The court overruled the demurrer and replications were filed. Various orders relating to the pleadings were entered and the cause continued. At the next term of court, after a jury had been impaneled, by agreement of parties, all previous orders were set aside, the replications were withdrawn and the plaintiff elected to stand by its demurrer to the pleas; whereupon the court gave judgment against the plaintiff. This writ of error is prosecuted to reverse that judgment. The only question for our consideration is the sufficiency of the special pleas. It is urged in behalf of the defendant in error that the judgment of the court is right, even though it be held that all of the special pleas are bad, for the reason that the plea of the general issue is good and that the demurrer applied to it as well as the other pleas. The demurrer did not specify the particular pleas against which it was interposed, but when it was filed the similiter had been added to the general issue. It applied, therefore, to the special pleas only, and an inspection of the entire record shows that it was so considered by the court and counsel when the order was entered allowing the withdrawal of replications and the election of the plaintiff to stand by its demurrer.

It is also urged that the declaration is bad and that the demurrer to the pleas should be carried back to the declaration. The court did nothing of the kind and could not carry it over the general issue and similiter thereto. Neither was it necessary for the plaintiff to except to preserve the plaintiff's right to call in question, in this court, the action of the court in overruling its demurrer and entering judgment against it because the pleas are unanswered. *Wiggins Ferry Co. v. The People ex rel.*, 101 Ill. 446; *McChesney et al. v. City of Chicago*, 151 Ill. 307.

The contention of the defendant in error that the judgment was entered by consent is not borne out by the record.

The first, second, third and fifth of the special pleas set up that some time before the earliest of the offenses charged

in the declaration was committed, a suit was brought by the plaintiff against the defendant for a like breach of the ordinance in question; that the justice of the peace who tried the case held the ordinance invalid and rendered judgment against the plaintiff for that reason, that such judgment has never been appealed from, and that by reason thereof the plaintiff is barred from prosecuting the defendant for any future violation of the ordinance.

It is plain to our minds that the decision of a justice of the peace adverse to the validity of a city ordinance for the violation of which a suit was pending before him could have no force or effect except as to that particular suit, and the pleas were, therefore, bad.

The fourth plea sets up the recovery of a judgment before a justice of the peace for the same violations declared upon in the declaration. That plea is bad because it attempts to answer the whole declaration, when it is apparent that it does not.

The limit of the jurisdiction of a justice of the peace is \$200, while the declaration charges 270 distinct violations, having that many dates, the penalties for which aggregate \$2,700. To render such a plea good it would have to aver that the different violations charged in the declaration are all one and the same violation, and for that a judgment had been recovered. A plea which professes to answer the whole declaration, but answers only a part, is bad on demurrer. 1 Chitty on Pleadings, 524; Buckmaster v. Beames, 4 Gil. 443; Gilbert v. Bone, 64 Ill. 518; George v. Bischoff, 68 Ill. 236.

The sixth special plea sets up the prosecution of four suits against the defendant before a justice of the peace for a violation of the ordinance, a decision in each case against the validity of the ordinance, the prosecution of an appeal, and an agreement, pending the appeal, made by the city attorney, that in consideration that the defendant would grade certain streets and refrain from contesting certain alleged excessive taxes, the defendant should be released from the payment of the penalties provided by the ordi-

nance and from further prosecution for violations of it. The plea further sets up the performance of the agreement by the defendant. It is clear the city attorney would have no power to enter into such a compromise, as that alleged, without authority from the city council; and such authority is a necessary averment. But it does not appear in the plea.

While the city council could, by agreement, release the defendant from penalty for violations already committed, an agreement not to prosecute for future violations would not be binding upon a future council. An agreement allowing a party to violate a city ordinance *ad libitum* and tying the hands of a future council against prosecution, is void.

The six special pleas were bad and the judgment will be reversed and the cause remanded with directions to the Circuit Court to sustain the demurrer to them. Reversed and remanded.

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F. M. Roberts, Adm., etc., v. John A. McNeal et al.

1. PRIORITIES—*Mortgage Lien—Taking a New Mortgage to Secure Payment of a Debt Secured by a Prior One.*—Where a party takes a new mortgage to secure the payment of the same debt secured by a prior one, and this fact is stated in the latter mortgage, no new note being taken, and gives a release of the old mortgage, there being no substantial difference in the two mortgages, it will not give a priority to a mortgage to a third person made and recorded after the first, but before the last of the said mortgages.

2. INCUMBRANCES—*Courts of Equity, Governed by Interest and Intention of Parties as to Priorities.*—A court of equity will keep an incumbrance alive or consider it extinguished, as will subserve the purpose of justice and the actual and just intention of the parties. It will sometimes hold a charge extinguished where it would subsist at law; and sometimes preserve it when, at law, it would be merged. The question is always one of interest and intention and the interest of the parties and intention are the two controlling considerations.

3. SAME—*Where No Intention Has Been Manifested.*—If no intention has been manifested by the parties, equity will consider the incumbrance as subsisting or extinguished as may be most conducive to the interests of the party.

Roberts v. McNeal.

Bill to Foreclose Mortgage.—Trial in the Circuit Court of Morgan County; the Hon. OWEN P. THOMPSON, Judge, presiding. Finding and decree for defendant; appeal by complainant. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

HENRY T. RAINEY, attorney for appellant, contended there was a complete novation where the owner of a mortgage debt enters satisfaction of the mortgage on the record, under an agreement with the mortgagor, to enable the latter to obtain money with which to make an investment on joint account, and the mortgagor fails to procure the money to make the investment as agreed, the entry of satisfaction will be good in favor of a party holding a subsequent mortgage, who took no part in procuring the entry of satisfaction, and the entry will not be set aside as to him. Seymour et al. v. Mackay et al., 126 Ill. 342; Dingman v. Randall, 13 Cal. 515; Stearns v. Godfrey, 16 Me. 158; Childs v. Stoddard, 130 Mass. 111 (1881).

The making of a new contract and the substitution thereof in the place and stead of the original contract before the breach of the latter, may operate as a discharge and extinguishment of the original contract, and so a novation of it. Am. and Eng. Ency. of Law, Vol. 16, p. 870.

“Prior contracts are merged in and superseded by a subsequent contract on the same subject, which, as the last act of the parties, must be held to contain and express their true meaning and intention.” Stow v. Russell, 36 Ill. 18.

“A novation takes place when a note of a debtor is taken in payment of a pre-existing debt; here the original obligation is extinguished, and a new liability on the note substituted.” Am. & Eng. Ency. of Law, Vol. 16, p. 873.

If money is borrowed on a mortgage for the purpose of paying off a former mortgage on the same lands, the fact that an intervening judgment lien was overlooked in examining the title will not enable the mortgagee to set up in equity the former mortgage after it has been duly discharged. Jones on Mortgages, Vol. 1, Sec. 971.

CHARLES A. BARNES and JOHN A. BELLATTI, attorneys for appellees.

Notwithstanding a release of record, a court of equity will keep an incumbrance alive or consider it extinguished, as will best serve the purposes of justice, and the actual and just intention of the parties. The intention is the controlling consideration, and to arrive at this the court will look into all the circumstances of the case. *Richardson v. Hockenhull et al.*, 85 Ill. 124; 1 *Hilliard on Real Property*, 444; *Flower et al. v. Ellwood et al.*, 66 Ill. 438; *Meacham v. Steele*, 93 Ill. 135; *Lowman v. Lowman et al.*, 118 Ill. 582; *Blatchford & Co. v. Blanchard et al.*, 160 Ill. 115.

MR. JUSTICE WRIGHT delivered the opinion of the court.

In April, 1882, William Riggall executed his note to Laura A. Doan for \$1,700, for money borrowed, and gave to the latter a mortgage upon land described therein to secure such note. February 24, 1890, Riggall sold the mortgaged premises to John A. McNeal, and by an arrangement between Riggall, Doan and McNeal, the latter executed to Doan a mortgage for \$1,700, due in five years from date, upon the same premises, in lieu of the mortgage given by Riggall, and at the same time McNeal executed a mortgage for \$700 to Riggall, due one day after date, these respective sums being of the purchase price of the land sold by Riggall to McNeal. The mortgage from McNeal to Riggall for \$700 contained this stipulation: "It is hereby agreed that this is a second mortgage and is subject and subordinate to a mortgage of same date for \$1,700, executed by said John A. McNeal to Laura A. Doan, and the said William Riggall agrees that the said mortgage to Laura A. Doan is and shall be prior lien in every sense." Both mortgages were duly recorded. At the maturity of the Doan mortgage McNeal desired an extension at a lower rate of interest, which was granted, and a new mortgage for \$1,700, at six per cent interest, was executed by McNeal to Doan upon the same premises, dated March 23, 1895, and recorded on March 26, 1895, and the mortgage of February 24, 1896, was released upon the margin of the record. Riggall having died, appellant was appointed his administrator. Laura

A. Doan also died, appellees, the Doans, being her executors. Appellant filed his bill in equity to foreclose the \$700 mortgage, in which he made appellees parties defendant. The executors of Laura A. Doan answered the bill, and also filed cross-bill to foreclose the \$1,700 mortgage, claiming a prior lien over the \$700 mortgage given to Riggall. Answer was filed to the cross-bill, and, upon the hearing, the foregoing facts appearing, the court gave its decree foreclosing both mortgages, but awarding to the Doan executors a priority against the Riggall mortgage from which appellant prosecutes this appeal, insisting that it was error to give the Doan mortgage a priority.

The principal point made in the argument of counsel for appellant, as we understand him, is, that the mortgage of February 24, 1890, having been released upon the margin of the record, as provided by the statute, it from thenceforth ceased to be a lien, and thereafter had no force or effect whatever.

In view of the undisputed facts in this case it is not perceived that it is material to the rights and equities of the parties that the mortgage of February 24, 1890, to Doan for \$1,700, was recorded and released upon the record thereof. It is a familiar principle that the debt is the principal thing. There can be no just claim that the debt represented by the Doan mortgage was ever paid, but merely renewed at a lower rate of interest. Riggall knew of the existence of this debt, and had by his own agreement made his mortgage second, and subordinated himself to it. This was done contemporaneously with the purchase from him of the land by McNeal, and as a part thereof, and by which Riggall was released from a similar obligation, this one of McNeal being substituted for it. When Riggall took the \$700 mortgage it was, by his own agreement, incumbered by the Doan mortgage. Had the latter remained upon the land, he would continue to have a lien by his mortgage upon the equity of redemption only. He suffers no prejudice by the change in the security. *Whittemore v. Shiell*, 14 Ill. App. 418. We see no difference in principle between the case presented, than

that involved in the cases to which reference is made in the case just cited, which are *Curtis v. Root*, 20 Ill. 53; *Christie v. Hale*, 46 Ill. 121; *I. C. R. R. Co. v. McCullough*, 59 Ill. 166; *Shaver v. Williams*, 87 Ill. 469. The principle is the same. In the latter case it was held that where a party takes a new mortgage to secure the payment of the same debt secured by a prior one, and this fact is stated in the latter mortgage, no new note being taken, and gives a release of the old mortgage, and there is no substantial difference in the two mortgages, this will not give priority to a mortgage to another and recorded after the first and before the last of said mortgages. In the case presented it is difficult to see how it could be material that it was omitted to recite in the new mortgage the fact it was a renewal of the old, for the reason that it can not be disputed such was the fact, and the representatives of Riggall as well as himself, knew it, and it is likewise conclusive the new note was the same debt represented by the old one, with this difference—which can not be said to be substantial—that the interest in the new was six per cent instead of seven, contained in the old note. Over and beyond this, we think it is a sufficient answer to the objections to this position to say that Riggall had, in legal effect, agreed to subordinate himself, as regarded his mortgage, to the Doan debt of \$1,700, now represented by the mortgage sought to be foreclosed by the cross-bill. It was the incumbrance of this particular debt, being a part of the purchase money of the land sold by him, that he had voluntarily consented might be paramount to his claim now sought to be made superior thereto.

In *Richardson v. Hockenhull*, 85 Ill. 124, citing *Hilliard on Real Property*, Vol. 1, page 444, it was said:

“A court of equity will keep an incumbrance alive or consider it extinguished, as will subserve the purpose of justice and the actual and just intention of the parties. It will sometimes hold a charge extinguished where it would subsist at law; and sometimes preserve it, when at law it would be merged. The question is always one of intention. The interest of the parties and intention are to be controlling considerations.”

Carlin v. Brown.

Again, citing *Campbell v. Carter*, 14 Ill. 286 :

“The intention is the controlling consideration where it has been made known, or can be inferred from the acts and conduct of the party; and the court will look into all the circumstances of the case to ascertain his real intention. * * * If no intention has been manifested equity will consider the incumbrance as subsisting or extinguished as may be most conducive to the interests of the party.”

In the case presented, the Riggall mortgage was due one day, and the Doan mortgage five years after the dates thereof. The evidence tends to show that the agent of Doan assumed, without sufficient examination, the Riggall mortgage no longer existed, and consented to, and did renew the Doan mortgage. This fact is only important as affecting the question of intention, and it seems to us conclusive from this circumstance, the interest of the parties, and all other evidence in the case, that at no time was it contemplated, nor was it the intention of the parties, to relieve Riggall from the effect of the stipulation contained in his mortgage, or to give him priority over the Doan mortgage. It follows, if we are right in the views herein expressed, the decree of the Circuit Court should be affirmed.

William P. Carlin v. Walter A. Brown.

1. **QUESTION OF FACT**—*When the Province of Court to Decide.*—Where a cause is tried without a jury, it is the peculiar province of the judge trying the case to decide where the truth is upon the disputed question of fact.

2. **INTEREST**—*On Judgment When Proper for Vexatious Delay.*—Three dollars and eighteen cents interest allowed on a judgment in this case by the trial court for the unreasonable and vexatious delay of payment, is proper.

Attachment.—Trial in the Circuit Court of Greene County; the Hon. OWEN P. THOMPSON, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

HENRY T. RAINEY, attorney for appellant, contended that interest is not chargeable on an open account where it has not been liquidated and the balance agreed on. *Flake v. Carson*, 33 Ill. 518.

Mere delay in payment is no ground for allowing interest. To appear and defend a suit is not an act to be construed into unreasonable and vexatious delay in the payment of money. *Aldrich v. Dunham*, 16 Ill. 403.

DOOLITTLE & SCANLAND, attorneys for appellee.

A party is liable for materials obtained for his use by another if he voluntarily availed himself of the use of the materials, or in any manner ratified the act of obtaining them. *Fisher v. Stevens*, 16 Ill. 397.

It was the province of the court, sitting as a jury, to determine whether or not there had been unreasonable and vexatious delay in the payment.

MR. JUSTICE HARKER delivered the opinion of the court.

This is an appeal from a judgment of \$67.90, recovered by appellee in a suit brought by him to recover for lumber material procured by one John Dawson and used by him in repairing some buildings owned by appellant.

There is no question made over the fact that the material was used in appellant's building, or that the charges for it are reasonable; but liability is denied upon the ground that appellant did not authorize Dawson to procure the lumber.

It appears from the evidence that, in 1890, appellant employed Dawson to remove and repair certain outbuildings situated on a lot in Carrollton, Illinois, owned by appellant, at a stipulated sum of \$40, appellant to furnish all necessary material. When Dawson was ready to do the work, appellant had moved to Washington, D. C., leaving a sister residing on his property and an agent at Carrollton who looked after his rents, taxes, etc., but without making any provision for the repairing material needed. Dawson called on Mrs. Harden, the sister of appellant, residing upon

Crawford v. Nimmons.

the property, to learn where he should procure material, and testifies that she told him to get it of appellee. She denies giving him any such instructions, but it was the peculiar province of the judge trying the case to decide where the truth was on that disputed question of fact. While Dawson, under the terms of his employment, had not authority, perhaps, in the first instance, to order the lumber, the fact that he acted under the direction of appellant's sister, then in the possession of the premises, in procuring the lumber from appellee, coupled with the fact that appellant has received the benefit of it and is now enjoying its use, and that the action of Dawson in doing the work in the absence of appellant, has been ratified by the payment to Dawson of the contract price agreed upon, ought not to leave much doubt as to the liability of appellant.

There is no merit in the contention that the judgment should be reversed because the trial court allowed interest on appellee's claim. Three dollars and eighteen cents interest was allowed, and properly so, for the unreasonable and vexatious delay of payment.

The judgment is right and will be affirmed.

Henry Crawford v. John Nimmons.

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180s	143

1. **USURY**—*Where Grantee of Mortgagor May Not Interpose Defense of, in Foreclosure Proceedings.*—Where a party accepts a deed conveying mortgaged premises for the express consideration of \$3,500 and "subject to a certain mortgage indebtedness of \$2,000, and interest thereon, dated," etc., he affirms such indebtedness and is estopped from making the defense of usury in a proceeding for the foreclosure of the mortgage.

Foreclosure Proceedings.—Trial in the Circuit Court of Montgomery County; the Hon. SAMUEL L. DWIGHT, Judge, presiding. Hearing and decree for complainant. Appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

LANE & COOPER and H. H. WILLOUGHBY, attorneys for appellant, contended that the mere fact that a conveyance

is made subject to a usurious mortgage does not purge the mortgage of the taint of usury or prevent the grantee from defending on the ground of usury.

CREIGHTON & GARDNER, attorneys for appellee, contended that the appellant having purchased the property expressly subject to the mortgage indebtedness and interest thereon, can not evade any portion of the debt. *Essley v. Sloan*, 116 Ill. 391.

The vendor in selling the land expressly subject to the mortgage indebtedness and interest thereon, affirmed the contract. *Henderson v. Bellew*, 45 Ill. 322; *Essley v. Sloan*, 116 Ill. 391; *Valentine v. Fish*, 45 Ill. 462.

The purchaser of land subject to a prior mortgage, can not set up usury in the same. *Green v. Kemp*, 7 Am. Dec. 169; *Engel v. Harris*, 43 Id. 624; *Jones on Mortgages* (2d Ed.), Secs. 744-745.

When the grantee contracts with a view to the incumbrance, or is informed of its existence and fails to obtain permission to urge the defense, the presumption is that the incumbrance, as it appears on its face, formed a part of the consideration he was to pay for the property, and it would be inequitable to permit him to escape its burden. *Maher v. Lanfrom*, 86 Ill. 522.

The acceptance of a deed expressly subject to an outstanding mortgage finally precludes the grantee from pleading usury. *Barthet v. Elias*, 2 Abb. N. Cas. (N. Y.) 364.

MR. JUSTICE WRIGHT delivered the opinion of the court.

This was a bill in equity filed by appellee against appellant to foreclose a mortgage upon real estate, given January 2, 1894, by Jesse A. Neal, who at that time owned the premises, to secure a note of same date executed by Neal to appellee for \$2,000, due in three years after date, with eight per cent interest. On the 28th day of February, 1898, Neal and wife conveyed the mortgaged premises by warranty deed to appellant for the expressed consideration of \$3,500, which deed contained this clause: "Subject to a certain mortgage indebtedness of \$2,000, and interest

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thereon, dated January 2, 1894." This deed was delivered to and accepted by appellant. Appellant answered the bill denying his liability for the mortgage indebtedness, and set up the defense of usury to the note, claiming that at the time of the purchase of the premises from Neal, it was expressly agreed he should be subrogated to all the rights of the mortgagor with reference to the mortgage, and should have the right to interpose the defense of usury to the mortgage and note, and that there had been no deduction from the price of the land on account of the incumbrance, and that appellant should succeed to all the rights of the mortgagor in the premises. Replication was filed to the answer, and upon the hearing the court found the equities with the complainant and gave decree for \$2,483.75, that being the amount due upon the note to date of decree, by computing interest at the rate of seven per cent, after allowing a credit for \$160, the interest for the first year, which had been paid by Neal. The bill contained an averment that on February 26, 1898, an agreement had been made that interest should be paid at the rate of seven per cent, although no proof of that averment was offered. From this decree appellant prosecutes this appeal, and the principal error insisted upon for a reversal is the disallowance by the court of the alleged defense of usury.

It appeared at the hearing that on March 30, 1898, appellant tendered \$1,840 upon the note and mortgage, and \$7.15, the costs accrued to that date, which being refused, the tender was kept good until the hearing. The only evidence introduced upon the hearing was the note, mortgage and warranty deed, and the oral evidence of Neal that he delivered the deed to appellant, and that it was accepted by him.

It is first insisted by appellant that the decree is personal against him, but in this counsel are mistaken, for it expressly provides that no decree for deficiency shall be taken, and the decree is otherwise to the effect that unless the amount found due is paid within twenty days the premises shall be sold.

The only question, therefore, for decision, is whether, under the facts stated, the appellant could set up the defense of usury against the note of his grantor, Neal. Appellant claimed by his answer that at the time he purchased the land of Neal it was expressly agreed he should have the right to interpose this defense, and unless the evidence sustains the answer in this respect it can not be well maintained he was in a position to make a defense which was personal to Neal alone. If by the transaction between appellant and Neal, the latter affirmed the usurious rate of interest specified in the note, and appellant accepted it, the latter ought not afterward be heard to say that he was substituted to the rights of the former in respect to the defense of usury. It seems too plain to us for argument, that when Neal inserted the clause in the deed that it was subject to the \$2,000, and interest thereon, that he thereby affirmed it, and that by the acceptance of the deed with such clause, appellant not only did not receive authority from Neal to make the defense of usury, but thereby, in effect, was prohibited from so doing. It is as evident to us in this case, as it was to the court in *Essley v. Sloan*, 116 Ill. 398, that the parties to the deed did not understand that any right was transferred to defeat any portion of the mortgaged indebtedness. The conclusion that it was understood at the time the deed was made that the incumbrance formed part of the consideration of the purchase, seems irresistible. Whether it was so agreed in express terms is not material. The legal effect is the same. The incumbrance then on the land was excepted out of the warranty and was made with a view to and subject to it, with, it can not be doubted, full knowledge of its amount and the priority of the lien created thereby, and no authority was given to or permission obtained by appellant to set up usury against the note, and the presumption is that the incumbrance formed part of the consideration. Neal had the right, if he chose, to affirm the validity of his usurious contract, and having conveyed only the equity of redemption, will be held to have done so.

Finding no error in the decree of the Circuit Court it will be affirmed.

Allen v. W. J. Quann & Co.

**Charles A. Allen, Wm. B. Redden, Oliver P. Stufflebeam
and Phillip Cadle, Copartners, etc., v.
W. J. Quann & Co.**

1. CONSTRUCTION OF CONTRACTS—*Meaning to be Gathered from the Language.*—The meaning of a contract is to be gathered from its language, and the presumption is that the contract means what the language used indicates.

2. SAME—*The Rule Illustrated.*—Where the proprietors of a canning factory entered into a contract for the sale of a quantity of their goods conditioned that in case of the destruction of the cannery by the elements, the seller is not to be held liable for non-delivery, and the cannery was afterward destroyed by fire, *it was held* that they were absolved from such delivery.

Assumpsit, for non-delivery of goods sold. Trial in the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1898. Opinion filed February 7, 1899.

SALMANS & DRAPER, attorneys for appellants.

PENWELL & LINDLEY, attorneys for appellees.

MR. JUSTICE HARKER delivered the opinion of the court. Appellants were engaged in the business of canning corn at Rossville, Illinois. On the 24th day of May, 1897, they entered into a written contract with appellee for the sale of 2,000 cases (two dozen each) of canned corn at fifty cents per dozen, to be of pack of 1897, and shipped during packing season as follows: One car of 700 cases as soon as possible, one car of 700 cases thirty days thereafter, and the last car thirty days after the second. On the 24th day of July, 1897, they entered into written contract with appellee for sale of 1,200 cases of pack of 1897, at fifty-five cents per dozen, to be shipped during the packing season as follows: 600 cases first and 600 cases fifteen days later. Each contract contained this condition: "In case of destruction of

cannery by the elements, the seller is not to be held liable for non-delivery."

On August 30th, appellants commenced canning, but before there had been any shipment to appellee the cannery was, on the 9th of September, destroyed by fire. Appellants afterward refused to ship the goods when called upon by appellee, insisting that they were absolved from doing so by the burning of the cannery and the above mentioned condition. This suit followed, resulting in a verdict and judgment in favor of appellee for \$600.

Appellants, by special plea, set up the destruction of the cannery by fire, and the condition that they were not to be held liable for non-delivery in the event of its destruction by the elements. In the view we take of the controversy, and the construction we place upon the condition, it is unnecessary to set out in this opinion the various replications interposed to the plea and the rejoinders thereto. The case was tried upon a false theory, and a construction was placed upon the contract by the court below that we can not approve. The court held that if at the time of the fire appellants had enough corn on hand to fulfill their contracts with appellee that was not destroyed, they would not be absolved from delivering on account of the fire and the condition. They had on hand 7,035 cases—more than enough to fulfill their contracts with appellee.

Such construction would leave appellants in a very embarrassing situation in the event of like outstanding contracts with other parties; and that condition of affairs appellant offered to prove, but it was denied them by the court.

In our opinion, appellants were, under the condition named, excused from the performance of any part of the contract not due at the time of the fire. The evidence shows that the canning season in 1897 began about the middle of August. The contract of May 24th, provided that the first shipment (one car, 700 cases) should be made as soon as possible, which of course, means within a reasonable time. At the time of the fire, 700 cases were due to be shipped, and

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no more. Not until thirty days after a reasonable time from the middle of August was the second shipment due.

The judgment will be reversed and the cause remanded so that the issues may be reformed and another trial had in conformity with the construction we place upon the contract. Reversed and remanded.

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**Milwaukee Mechanics Ins. Co. v. R. J. Graham, use of
First National Bank, etc.**

1. **INSURANCE—Delivery of Policy Unnecessary—Promise to Pay the Premium Necessary.**—It is not necessary, in order to hold an insurance company to liability for a loss, that the policy shall have been delivered or the premium paid; but in a case where the policy has not been delivered nor the premium paid or tendered, a promise to pay the premium is necessary. Without a promise to pay for the insurance the undertaking of the company would be *nudum pactum*.

2. **CONTRACTS—A Fundamental Rule.**—It is fundamental that unless the parties have come to an agreement as to the terms of their contract, so that nothing remains to be done but to execute what has been agreed upon, the contract is still incomplete and of no binding force upon either party.

Assumpsit, on a contract of insurance. Trial in the Circuit Court of Pike County; the Hon. THOMAS N. MEHAN, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

E. A. PERRY, attorney for appellant.

An oral contract to issue a policy of insurance is binding and may be specifically enforced in equity. 1 Joyce on Ins., 95, citing Dunning v. Phenix Ins. Co., 68 Ill. 414; Wooddy v. Old Dominion Ins. Co., 31 Grat. (Va.) 362.

One in possession of blank policies, signed by the president and secretary, is a general agent (May on Ins. (2d Ed.), 139; 1 Joyce on Ins., 475, citing Phenix Ins. Co. v. Munger, 49 Kas. 178), and may bind the company by parol. May on Ins. (2d Ed.), 141; Farmers & Merchants Ins. Co. v.

Chestnut, 50 Ill. 111; Phenix Ins. Co. v. Stocks, 149 Ill. 319; Home Ins. Co. v. Field, 53 Ill. App. 119.

While parol contract of insurance must contain all the essentials of a contract, they need not be expressly negotiated upon, since they may be understood, as where the usual rate of premium is presumed to have been meant. 1 Joyce on Ins., 106, citing *Winne v. Niagara F. Ins. Co.*, 91 N. Y. 185.

The terms of the contract being specified, the minds of the parties meet when the insurer signifies his acceptance of the application by some overt act. 1 Joyce on Ins., 103, citing *Schwartz v. Germania Ins. Co.*, 18 Minn. 448; *Shattuck v. Mut. Life Ins. Co.*, 4 Cliff. 598.

A contract arises when an overt act is done, intended to signify an acceptance of a proposition, whether such overt act comes to the knowledge of the proposer or not. The acceptance of a proposal to insure for the premium offered is the completion of the negotiation. *Hallock v. Commercial Ins. Co.*, 2 Dutch. (N. J.) 268.

Where an application was made for insurance, the rate of premium and duration of risk not specified, the policy written and entered upon the register of completed contracts and the property burned before delivery of the policy, held, valid contract. 1 Joyce on Ins., 107, citing *Winne v. Niagara F. Ins. Co.*, 91 N. Y. 185.

In an action on a policy of insurance which had been filled up and signed, but not delivered, and on which no premium had been paid, it is for the jury to say within what time the insured should pay the premium and accept policy. 1 Joyce on Ins., 114, citing *Baxter v. Massasoit Ins. Co.*, 13 Allen (Mass.), 320.

A contract to issue an insurance policy is equivalent to the actual issuance of the policy so far as the binding force of the contract is concerned. 1 Joyce on Ins., 143, citing *Springer v. Anglo-Nevada Ins. Co.*, 33 N. Y. 543.

An agent authorized to insure may give credit. *Ib.*

Where an application was made to an agent for insurance and the agent agreed to issue and send the appli-

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cant a policy on a certain day and the policy was in fact issued on, and bore date on, that day, but was not delivered, nor the premium paid for several days thereafter, it was held that the policy became binding from its date. 1 Joyce on Ins. 156, citing Hubbard v. Hartford Fire Ins. Co., 33 Iowa, 325.

When the premium is to be paid on the delivery of the policy and a loss by fire occurs before the delivery, the company is liable. 1 Joyce on Ins., 162, citing Angell v. Hartford F. Ins. Co., 59 N. Y. 171.

A contract of insurance may be complete and binding upon the parties without either the payment of the premium or delivery of the policy. Joyce on Ins., 106, 161; 1 Biddle on Ins., 138, 193, citing New England F. & M. Ins. Co. v. Robinson, 25 Ind. 536; American Horse Ins. Co. v. Patterson, 28 Ind. 17.

An application was made to an agent for insurance, but nothing was said as to what company the risk was to be placed in. Agent wrote a policy in one of the companies represented by him, the policy providing that there should be no liability until the premium was paid. Held, that the question of agency was not affected because the principal was undisclosed and the agent had authority to bind the company by a parol agreement extending the time for making payment. Young v. Hartford F. Ins. Co., 45 Iowa, 377, citing Miss. Valley Ins. Co. v. Neyland, 9 Bush (Ky.), 430; Sheldon v. Conn. Mut. Ins. Co., 25 Conn. 207.

It is sufficient to constitute a parol contract of insurance if one party proposes to be insured and the other party agrees to insure and the elements are agreed upon or understood and the premium paid if demanded. Eames v. Home Ins. Co., 4 Otto (U. S.), 621.

The rule that an act done at one time may take effect as of a prior time by relation back to the principal contract is applicable to the contract of insurance; the agreement to insure being the principal act, the payment of the premium and the formal execution of the policy may be concurrent therewith or subsequent thereto. City of Davenport v. M. & F. Ins. Co., 17 Iowa, 276.

A valid contract of insurance may be made without a delivery of a policy. *Fire Association v. Smith*, 59 Ill. App. 655; *Robinson v. Peterson*, 40 Ill. App. 132; 1 Joyce on Ins. 156 and 1513, citing *Loring v. Proctor*, 26 Me. 18; *Ins. Co. v. Colt*, 20 Wall. 560; *Blanchard v. Waite*, 28 Me. 51.

A valid contract of insurance may be made without a payment of premium. *Robinson v. Peterson*, 40 Ill. App. 132; *Home Ins. Co. v. Field*, 53 Ill. App. 119; *Huggins Cracker & C. Co. v. People's Ins. Co.*, 41 Mo. App. 530; 1 Joyce on Ins., 139.

An agent authorized to take and approve risks and issue policies is, by general usage, empowered to allow credit for premium. 1 Joyce on Ins., 686, citing *Tennant v. Travelers' Ins. Co.*, 31 Fed. Rep. 322.

In the case of an oral contract for insurance, the prepayment of the premium is not necessary until the policy issues; but when the policy is tendered the insured must pay the premium unless a credit is given. 1 Joyce on Ins., 135, citing *Davenport v. Peoria, etc., Ins. Co.*, 17 Iowa, 276.

An application for insurance was made and the company executed the policy to take effect that day at noon, both application and policy remaining in the hands of the company. The building having burned, the insured went to the insurers, who were ignorant of the loss, paid the premium and received the policy. Held, on the acceptance of the terms the minds of the parties had met and the contract became binding on them. *Keim v. Home Mut. Ins. Co. of St. Louis*, 42 Mo. 38.

Countersigning by the agent is evidence of the completion and delivery of the contract. May on Ins. (2d Ed.), 70; 1 Joyce on Ins. 666, citing *Myers v. Keystone, etc., Ins. Co.*, 27 Pa. St. 268; *Peoria, etc., Ins. Co. v. Walser*, 22 Ind. 73.

To constitute a delivery of a policy it is not necessary that there should be an actual manual transfer from one party to the other. The agreement upon all the terms and the doing of any act that signifies the intention that it shall become operative constitute a delivery. May on Ins. (2d Ed.), 63, 64.

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An agent may bind the company by an oral agreement and a memorandum in his "binding book;" and this, though insurance be placed at the discretion of the agent, insured not knowing where. May on Ins. (2d Ed.), 44, 63; 1 Joyce on Ins., 75, 127; citing Croft v. Hanover F. Ins. Co., 21 S. E. Rep. 854; Putnam v. Home Ins. Co., 123 Mass. 324.

It is held in Louisiana that when an application for insurance is accepted, the policy written, and the name of the assured as such is entered on the company's books, the contract is complete. 1 Joyce on Ins., 139; citing Pino v. Merchants Mut. Ins. Co., 19 La. 214.

When a person does an act or makes a declaration which he can not contradict without operating a fraud—without an injury to another whose conduct has been thereby influenced, he is estopped to contradict it. Smith v. Newton, 38 Ill. 230; Hefner v. Vandolah, 57 Ill. 520; International Bank v. Bowen, 80 Ill. 541.

Where, under the policy, the company may elect to terminate the risk in a certain contingency, upon notice of its intention to do so, liability of the company ends upon notice, on the happening of the contingency. Albany City F. Ins. Co. v. Keating, 46 Ill. 394.

The distinction between a contract to insure or to issue a policy of insurance, and the policy itself, is obvious and constantly recognized by the courts. The former may be by parol or in any form. May on Ins. (2d Ed.), 22.

In insurance the writing is only required for proof of the contract. The writing is extrinsic to the substance of the agreement. 1 Joyce on Ins., 78, 79; Hartford Ins. Co. v. Farrish, 73 Ill. 166.

A parol contract of insurance is, in effect, the contract of the company as expressed in the policies usually issued by them. 1 Joyce on Ins., 94, citing Hubbard v. Hartford F. Ins. Co., 33 Iowa, 325.

A contract for insurance otherwise sufficient is valid, though in parol; there is nothing in the rules of the common law or in existing statute, which forbids. Hartford F. Ins. Co. v. Wilcox, 57 Ill. 180; People's Ins. Co. v. Paddon,

8 Ill. App. 447; May on Ins. (2d Ed.), 15, 20; 1 Joyce on Ins. 75; Stoeble v. Hahn, 55 Ill. App. 497.

A contract of insurance is complete when it contains all the elements essential to such contracts, with a meeting of minds upon all the circumstances peculiar to contracts of such a nature, so nothing remains to be done but to fill up and deliver the policy and pay the premium. People's Ins. Co. v. Paddon, 8 Ill. App. 447; 1 Joyce on Ins., 103; May on Ins. (2d Ed.), p. 42.

A parol agreement for insurance made with an agent takes effect immediately, although entered into contemporaneously with an agreement by the insurers to deliver, and the insured to accept and pay for, as a substitute therefor, a policy in the usual form, and remains in force till the delivery or tender of such policy. May on Ins. (2d Ed.), 21, 69.

MATTHEWS & GRIGSBY, attorneys for appellee.

The right to cancel policy strictly is to be construed, and can only be exercised by a strict compliance with the terms and conditions upon which it is admissible. May on Insurance, Secs. 67, 68 and 574; Chase v. Phoenix Ins. Co., 67 Me. 85; Beach on Insurance, Vol. 2, Sec. 823; Wood on Insurance, Sec. 113; Peoria M. & F. Insurance Co. v. Botto, 47 Ill. 516; Aetna Ins. Co. v. Maguire et al., 51 Ill. 342; Hartford Fire Ins. Co. v. McKenzie, 70 Ill. App. 615.

Fire insurance policies contain a provision whereby either party may terminate the risk and it is only by virtue of this that the insurers may exercise such right. Am. & Eng. Ency. of Law, Vol. 7, page 1009, and authorities there cited.

But to terminate the policy the insurer must give notice of such intention to the assured, and if the loss be payable to a third party, as a mortgage, it must be given to him also. Lattan v. Royal Ins. Co., 45 N. J. L. 453.

An objection that the damages assessed against a defendant are excessive, can not be made for the first time on appeal; the reason being that whatever could have been

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corrected in the court below, either by a change in the verdict or judgment by the trial court, or by remittitur, must there be presented in order that an opportunity may be there had to correct the error. *Stern v. Tuch*, 55 Ill. App. 445; *Brewer & Hoffman Co. v. Boddie*, 162 Ill. 346; *Hintz v. Graupner*, 138 Ill. 158.

MR. JUSTICE HARKER delivered the opinion of the court.

Appellee is the owner of a fruit evaporating plant at Pittsfield, Ill. On the 27th of October, 1897, C. K. Graham, his operating manager, procured from F. W. Niebur, agent of the Milwaukee Mechanics Insurance Company, a fire insurance policy on the machinery and fruit on hand. The policy was delivered, but the premium was not paid, the agent declining to receive it until he should learn from the company whether it would carry the risk. It was provided in the policy that the contract should become void if other insurance on the property should be procured without consent of the company, and that the policy might be canceled at any time by giving five days' notice. On the 30th of October Niebur received notice from the company that it would not carry the risk, and directing him to cancel the policy. He at once sent a note to C. K. Graham informing him that his company declined the risk and requesting him to procure other insurance. Graham, at noon of the same day, called at the office of E. A. Burk, another insurance agent, showed the note to him, "gave him the particulars," and asked him if he could write the risk in some company represented by him. Burk replied that he thought he could, whereupon Graham left the office, promising to call again. Burk at once wrote a policy in the Hanover Insurance Company of New York on one of the blanks furnished him, with the signatures of the president and secretary, covering the property from October 30 to November 30, 1897, countersigned it himself and entered it in his register of policies. The policy was not delivered to Graham, the premium was not paid by him, nor did he promise to pay it. That night the property was destroyed by fire.

This suit was commenced against appellant on the first named policy and was defended upon the ground that Graham had waived his right to have the policy continue in force five days after notice of cancellation, and that the policy became void by reason of a contract of insurance effected with the agent of the Hanover Insurance Company. A trial by jury resulted in a verdict and judgment against appellant for the full amount named in the policy.

It is clear that the right of appellee to recover depends entirely upon whether he consummated a contract of insurance with the Hanover Insurance Company. By its own terms the policy sued on was to continue in force for five days after cancellation unless other insurance was effected. The risk was with appellant, within the five days, up to the instant that it should be assumed by another company and agreed to by the insured.

While it is not necessary in order to hold an insurance company to liability for a loss that the policy shall have been delivered or the premium paid, in a case where the policy has not been delivered nor the premium paid or tendered, a promise to pay the premium is necessary. Without a promise to pay for the insurance the undertaking of the company would be *nudum pactum*.

It is fundamental that unless the parties have come to an agreement as to the terms of their contract, so that nothing remains to be done but to execute what has been agreed upon, the contract is still incomplete and of no binding force upon either party. We can see no reason for departing from that familiar rule in the law of contracts in a case where the parties were negotiating over a contract of insurance.

In the case at bar there was neither a delivery of the policy, a payment of the premium, a tender of the premium, nor a promise to pay. The matter was in an incomplete condition at the time of the fire, and there was no such contract effected as could render the Hanover company liable.

The trial court entertained the view that in order to render

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a contract of insurance valid and binding a delivery of a policy, a payment of the premium or a tender of it is necessary, and so told the jury in modified instructions. That, of course, was erroneous.

The right to make parol contracts of insurance is recognized by our courts, and the contract may be completed by the mere promise of the insured to pay the premium. But as there was not even a promise made to the agent of the Hanover company to pay the premium, and we are clearly of the opinion that the policy of appellant was in force at the time of the fire, no harm resulted from the modification of those instructions. The judgment is right and no such error intervened as would justify a reversal. Judgment affirmed.

Mabel M. Morgan v. Charles W. Lowman.

1. ALIMONY—*Where Divorced Husband is Absolved from Burdens of Vested Rights.*—Where a divorced wife remarries, the divorced husband is absolved from the burdens of a decree requiring him to pay alimony. She has a vested right only in that which has accrued up to the date of the second marriage. It is her privilege to abandon the provision of the decree for her support by entering into marriage with another man, but when she does so the law will require her to abide by her election.

Scire Facias, to revive a decree for alimony. Heard in the Circuit Court of Logan County; the Hon. GEORGE W. PATTON, Judge, presiding. Judgment for plaintiff; appeal by plaintiff. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

OSCAR ALLEN, attorney for appellant.

There are various methods to enforce the payment of alimony in arrears (Bishop's Marriage and Divorce, Sec. 498, Vol. 2), and in Illinois *scire facias* is a proper proceeding. *Chestnut v. Chestnut*, 77 Ill. 346; *Wren v. Moss*, 1 Gil. 560; *Morton v. Morton*, 4 Cush. (Mass.), 518.

Remarriage is ground for application to reduce alimony

after application, but does not stop it without such application. *King v. King*, 38 Ohio St. 370; *Olney v. Watts*, 43 Ohio St. 499; *Sammis v. Medbury*, 14 R. I. 214; *Stillman v. Stillman*, 99 Ill. 197.

In England decree for alimony is only while wife is single, but it is not so in this country, nor would such remarriage generally be available even in an application for reduction. *Bishop's Marriage and Divorce*, Vol. 2, Sec. 479.

BEACH & HODNETT, attorneys for appellee.

Where the divorced wife again remarries and her second husband supports her from the time of said remarriage, she has no claim on her former husband for support. *Stillman v. Stillman*, 99 Ill. 196; *Storey v. Storey et al.*, 125 Ill. 608; *Bowman v. Worthington*, 24 Ark. 522; *Fisher v. Fisher*, 2 Swabey & Tristain, 411; *Albee v. Wyman*, 10 Gray (Mass.), 222; *Southworth v. Southworth*, 47 N. E. Rep. (Mass.) 93.

A decree for alimony is not *res adjudicata*. If facts occur after its rendition which make it proper, the decree should be altered or revised. *Craig v. Craig et al.*, 64 Ill. App. 48; *Stillman v. Stillman*, 99 Ill. 196; *Southworth v. Southworth*, 47 N. E. Rep. 93.

MR. JUSTICE HARKER delivered the opinion of the court.

On the 16th of June, 1891, the Circuit Court of Logan County granted appellant a divorce from appellee, and by the terms of the decree required him to pay to her alimony at the rate of \$120 per year, payable quarterly. On the 29th of September, 1892, she remarried one James Morgan, who has since then supported her. No part of the alimony having been paid, appellant commenced proceedings by scire facias to revive the decree and compel appellee to pay \$850, then claimed to be due under it. Appellee filed a plea setting up that he was released from the terms of the decree by the remarriage of appellant. Upon a hearing the court held she was entitled to alimony to the date of her remarriage and revived the decree to that extent, but held that she was barred from alimony thereafter.

Young v. Jordan.

Where a divorced wife remarries, the divorced husband is absolved from the burdens of a decree requiring him to pay alimony. She has a vested right only in that which has accrued up to the date of the second marriage. It is her privilege to abandon the provision which the decree of the court makes for her support by entering into marriage with another man, thereby seeking her support from another direction, but when she does so the law will require her to abide her election. *Stillman v. Stillman*, 99 Ill. 196; *Storey v. Storey et al.*, 125 Ill. 608; *Albee v. Wyman*, 10 Gray, 222; *Bowman v. Worthington*, 24 Ark. 522.

We think the court had full power to revise the decree in the proceeding to revive by scire facias, and it was not indispensable that the party against whom the decree was rendered should have himself instituted proceedings for that purpose. Decree affirmed.

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John H. Young v. A. D. Jordan.

1. **SPECIFIC PERFORMANCE**—*Tender, When Unnecessary*.—It is not necessary to make a tender of performance on a day fixed where the opposite party abandons the contract or refuses to perform it on his part before such date.

Bill to Enjoin a Suit at Law, and for Specific Performance.—Trial in the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Decree for complainants. Error by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

R. R. WALLACE and S. P. ROBINSON, attorneys for plaintiff in error.

An agreement to convey by a good and sufficient warranty deed calls for a title free from incumbrances. *McCord v. Massey*, 155 Ill. 125; *Thompson v. Shoemaker*, 68 Ill. 256; *Morgan v. Smith*, 11 Ill. 194; *Brown v. Cannon*, 5 Gilm. 174.

All that appellant was required to do, was to be ready and willing to perform on his part if appellee was on his. *Clark v. Weis*, 87 Ill. 438; *Mathison v. Wilson*, 87 Ill. 51; *Hough v. Rawson*, 17 Ill. 591; *Smith v. Lamb*, 26 Ill. 398.

JOHN E. POLLOCK, attorney for defendant in error.

It was not necessary for Jordan to make a tender of performance on the 1st of March, because Young had wholly abandoned the contract and refused to perform before that date. *Dulin et al. v. Prince*, 124 Ill. 80; *Towner v. Tickner*, 112 Ill. 217; *Mathison v. Wilson*, 87 Ill. 51; *Lyman v. Gedney*, 114 Ill. 390.

A contract which may be specifically enforced, if by reason of events occurring subsequent to the filing of the bill a specific performance can not be decreed, equity, having jurisdiction, will proceed and award such damages for non-performance as might, under other circumstances, be recoverable at law. *Greer v. Sellers*, 64 Ill. App. 505, and cases cited.

MR. JUSTICE WRIGHT delivered the opinion of the court.

Defendant in error filed his bill in equity against plaintiff in error to enjoin a suit at law and to reform a contract of sale to plaintiff in error of certain real estate and to enforce its specific performance. Plaintiff in error answered the bill and filed cross-bill to cancel the contract, and for decree for \$1,000 paid to defendant in error under such contract, and \$1,000 damages for breach thereof. The cause was referred to the master who took the evidence and reported his conclusions of law and fact, and the court having overruled exceptions, approved the report of the master and entered a decree in accordance with the findings, by which the suit at law was perpetually enjoined, specific performance of the contract denied and the cross-bill dismissed 'for want of equity, to reverse which appellant prosecutes this writ of error.

It appears from the evidence that defendant in error, by written contract, sold to the plaintiff in error, June 18, 1895,

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160 acres of land in Livingston county for \$11,000, to be paid \$1,000 in cash, \$4,500 March 1, 1896, and \$5,500 in five years from March 1, 1896, with six per cent interest, payable annually. Appellee was to convey by warranty deed, and show perfect title by abstract on or before March 1, 1896, and give possession on the latter date. The \$1,000 was paid at the time the contract was made. There was nothing said in the contract concerning the manner in which the payment of the \$5,500, due March 1, 1896, was to be secured, and it is contended by the original bill, and denied by the answer, that it was the agreement of the parties at the time of the contract that a mortgage was to be given for the \$5,500, this stipulation having been by inadvertence omitted from the written contract. Soon after the contract was made plaintiff in error became dissatisfied with his purchase, informed the defendant in error he would not take the land and purchased land elsewhere, and the latter, acting upon such information, leased the land to a tenant for a year, beginning March 1, 1896, and also February 29, 1896, mortgaged it for \$5,500, after which, and on the same day, plaintiff in error tendered defendant in error the cash payment due March 1, 1896, and demanded deed of the premises according to the contract, which latter was offered, subject to the mortgage which had been made, and for which reason plaintiff in error declined to accept it, and also declined to make such mortgage himself, although that alternative was offered to him, with the proposition that such previous mortgage, given by defendant in error, would be released. From the whole evidence we think it fairly appears it was the understanding at the time of the contract that plaintiff in error was to give a mortgage upon the premises to secure deferred payments. His refusal to accept deed was upon the sole ground no mortgage was to be given, and that his note alone was to be accepted. No special objection was made that defendant in error had already made such mortgage, but the objection was general to any mortgage. After this plaintiff in error brought a suit at law against defendant in error upon the written contract to

recover the \$1,000 paid thereon, and also for \$1,000, the penalty provided in such contract for a failure by either party to comply with its terms. A preliminary injunction was granted against such suit, and the decree herein made the same perpetual.

We think the findings of the master and the decree of the court are sustained by the evidence. The letters written by plaintiff in error to defendant in error were sufficient to induce in the mind of a reasonable man the conclusion that it was not the purpose of the former to complete his purchase of the premises, and it was but natural the latter, acting upon such conclusion, so reasonably induced, would wish to protect himself, as far as possible, against consequent loss, and therefore leased the land for the following year, and to provide for the \$5,500 he owed to Amsler, of whom he had purchased, executed the mortgage. It is the fair conclusion from the evidence that soon after the contract, plaintiff in error concluded not to complete the purchase of the premises, and it is also apparent from his acts and the circumstances attending the tender of the \$4,500 to defendant in error, and the demand for the deed, and its refusal when offered, that by such means the consummation of the contract was neither desired nor expected. When, at this time, the proposition was made to let him in possession, notwithstanding the tenancy of another person, and to release the mortgage already put upon the land by defendant in error, it was declined for the assigned reason he was not then prepared to comply, it was manifest he was not actuated by a real desire to comply. If the plaintiff in error was in earnest he should at all times have been ready and willing to comply with the terms of his contract; but we are impelled to the conclusion it was not his purpose or intention to do so.

Finding no error in the decree of the Circuit Court, it is affirmed.

**Railway Officials & Employees' Accident Association v.
Kate R. Coady.**

1. **ADMISSIONS—Of Third Persons, When Admissible.**—In some cases the admissions of third persons, strangers to the suit, are admissible, but this is so when the issue is substantially upon the mutual rights of such persons at a particular time; in which case the practice is, to let in such evidence in general as would be legally admissible in an action between the parties themselves.

2. **ACCIDENTS—Death by—Questions of Fact.**—The question as to whether a person died from accidental causes is one of fact, to be determined the same as other questions of fact.

3. **INSURANCE—Contracts of—Construction.**—All contracts of insurance are to be liberally construed in favor of the insured so as not to defeat, without a plain necessity, his claim to the indemnity which, in making the insurance, it was his object to secure; and when the words used are without violence, susceptible of two interpretations, that which will sustain his claim and cover the loss must in preference be adopted.

Assumpsit.—Trial in the Circuit Court of Champaign County; the Hon. FRANCIS W. WRIGHT, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

GERE & PHILBRICK, attorneys for appellant.

Where the evidence tends to prove a certain state of facts the party in whose favor it is given has the right to have the jury instructed on the hypothesis of such state of facts, and leave it to the jury to find whether the evidence is sufficient to establish the facts supposed in the instruction. *Kendall v. Brown*, 74 Ill. 232; *T. U. & Co. v. W. U. Tel. Co.*, 60 Ill. 421.

One of the exceptions to hearsay evidence is the case of declarations of a deceased person having peculiar means of knowing a fact, made against his pecuniary interest, the law being that such declarations are admissible, even in suits in which such deceased person or those claiming under him, was or is a party, provided such deceased party could have been examined in regard to the matter in his lifetime. *Friberg v. Donovan*, 23 Ill. App. 58-62; *Drabek v. G. L. B. S. Society*, 24 Ill. App. 82; 1 Greenleaf on Ev., Sec. 147, *et seq.*;

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Higham v. Ridgway, 10 East, 109; Taylor v. Gould, 57 Penn. St. 152.

Where the accident is occasioned by disease there can be no recovery, though the immediate cause of the death may not have been the disease. Sharpe, Adm'r, v. Commercial Travelers' Ass'n, 139 Ind. 92; Commercial Travelers' Ins. Co. v. Fulton et al., 79 Fed. Rep. 423; 24 C. C. A. 654; Travelers Ins. Co. v. Selden, 78 Fed. Rep. 285; 24 C. C. A. 92; National Masonic Acc. Ass'n v. Shryock, 73 Fed. Rep. 774; 20 C. C. A. 3.

WOLFE & SAVAGE, attorneys for appellee.

The policy must be construed liberally so as not to defeat, without plain necessity, the insured's claim to indemnity, which in making the insurance it was his object to secure. Healey v. Mutual Accident Association, 133 Ill. 556.

The language of an insurance policy being that of the insurer, the provisions of the policy are usually construed most favorably for the insured in case of doubt or uncertainty. The policy must be liberally construed in favor of the insured, so as not to defeat, without plain necessity, his claim to the indemnity, which, in making the insurance, it was his object to obtain. A policy of accident insurance is issued and accepted for the purpose of affording indemnity against accidents and death caused by accidental means, and its language must be construed with reference to the subject to which it is applied. Healey v. Mutual Accident Association, 133 Ill. 556; Travelers' Insurance Co. v. Dunlap, 160 Ill. 642.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was an action of assumpsit by Kate R. Coady, the plaintiff, against the Railway Officials and Employees' Accident Association, the defendant, in which she recovered in the Circuit Court of Champaign County, a verdict and judgment for \$1,026.52. The appellant prosecutes an appeal to this court and urges us to reverse that judgment

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on the grounds that the verdict is against the evidence, the court refused to admit proper evidence offered by the defendant, and gave improper and refused proper instructions.

The declaration charged that the defendant, on the 26th of November, 1896, issued to John Coady, the husband of the plaintiff, a certain certificate of membership, or policy of insurance, in which it agreed to pay her \$1,000 in case of the death of John Coady, resulting solely from physical bodily injuries, caused by accidental, external and violent means, not voluntarily inflicted; that John Coady complied with all the conditions therein contained up to the time of his death, which occurred June 18, 1897, as the sole result of external, violent and accidental means not voluntarily inflicted; and that the plaintiff was his widow and had given the defendant the notice and proof of the above facts as required by the terms of the said certificate or policy. A copy of the certificate or policy was attached to and made a part thereof. The defendant pleaded the general issue, upon which issue was joined and a trial by jury had, resulting in a verdict for the plaintiff as above stated.

The defendant admitted that a certificate or policy was issued as claimed in the declaration; that it was in force when John Coady died; that the plaintiff was his widow; that proofs of loss were made in due form, and were submitted to and received by the defendant in due time; and that the plaintiff waited the necessary time before commencing this suit. The certificate or policy contained, among other conditions, this provision: "This insurance shall not cover disappearances, nor injuries nor death for which there is no visible, external mark upon the body of the insured (the body itself in case of death not being deemed such mark); nor death nor injury resulting from or attributed partially or wholly, directly or indirectly, by or in consequence of any of the following causes: diseases or bodily infirmity; * * *

The evidence shows that John Coady, at the time of his death, on June 18, 1897, was in the employ of the "Big Four Railroad Company" at Urbana, Illinois, as flagman

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and freight handler in its yards and freight house; that he had been so employed for several years before that time, and that for the last year of his life he was somewhat afflicted with a cough which seemed to come from his lungs, and at times, when exercising very freely, he suffered somewhat with shortness of breath, but was able to perform with satisfaction to his employer, all his duties as such flagman and freight handler.

The evidence further shows that on June 18, 1897, John Coady, after working up to 5 o'clock P. M., was sent by the agent of the "Big Four Railroad Company" to take the freight mail from the freight house, situated on the north side of the tracks in Urbana, to the passenger depot, about two and a half blocks distant, and south of the tracks. In going, he ran, to avoid a severe storm that seemed then about to commence, taking his dinner pail in one hand and the package of mail in the other, and when he had run a considerable distance along the tracks, he was seen to stumble, throw up his hands, fall and strike his side against one of the rails, and then roll on the ground. His dead body was found, almost immediately after he fell, lying across the rails, the blood oozing freely from his mouth and nose. There is a sharp conflict in the evidence, however, as to whether or not any marks of external violence were visible upon his body—the witnesses for the plaintiff swearing that there were some bruises on his face and one on his right side, a little below the nipple, the latter being about three or four inches long and two inches wide; while the witnesses for the defendant swore there were none. The doctors who testified under the assumption that the facts were as above, stated that in their opinion it was almost impossible to tell what caused the breaking of the blood vessel, from which there was a hemorrhage causing death; that the exercise of running might have caused it, owing to the diseased condition of the lungs, indicated by the coughing and shortness of breath; or it might have been caused by an external blow received by the fall.

We have carefully examined all the evidence and find

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that there is ample testimony in this record to support the verdict, and as it is the special province of the jury to settle questions of fact in cases of conflicting testimony, and when all the evidence is fully considered, we do not feel justified therefrom, in holding that the verdict is contrary to the evidence to such an extent that we ought to reverse the judgment for that reason.

On the trial the defendant offered in evidence a paper marked "Exhibit A," which was written in pencil and is as follows:

"CHAMPAIGN COUNTY, URBANA, ILLINOIS, June 18, 1897.

"We, the jury, sworn to inquire into the death of John Coady, do find upon our oaths that deceased came to his death due to hemorrhage of the lungs from natural causes. E. C. Johnson, foreman; J. S. Prose, Albert J. Busey, Chas. Duncan, John Nepper, F. M. Robbins."

On back of which appeared the following:

"Verdict of jury upon the body of John Coady, filed June 25, 1897. J. W. Porter, Circuit Clerk."

To the introduction of which, counsel for the plaintiff objected, for the reason that it was not an official verdict. The court ruled on the objection by saying: "The paper on its face is simply a pencil memorandum, signed by certain gentlemen who say they were sworn, but by whom it does not appear. There isn't anything on the face of the paper sufficient to identify it as proper to be made a record of the circuit clerk's office, and the objection will be sustained." To which ruling the defendant excepted; and now insists that the court committed error in not permitting the paper to go to the jury; but it seems to us that there was no error in this ruling, because, manifestly, the paper neither on its face nor from any proof then made or then offered to be made thereafter, showed it to be the verdict of a jury duly selected and sworn in view of the body of John Coady, deceased, as prescribed by law (Sec. 16, Chap. 31 R. S., S. & C. Ill. Statutes, 1896), so that the court properly sustained the special objection made thereto.

It is true the record shows that afterward the appellant did prove that, at the request of the agent of the "Big Four

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Railroad Co.," at Urbana, Dr. Sims, then police magistrate of that place, held what is called by counsel for the appellant, an inquest, in which it appears that a jury was called and sworn, and that they examined the dead body of John Coady and signed the paper called "Exhibit A," which Dr. Sims took to the circuit clerk of Champaign county, and which he filed in his office, but after this proof was made, even if "Exhibit A" was then shown to be proper evidence to go to the jury in this case, the record fails to show that it was afterward offered in evidence.

The appellant further complains that the court refused to permit the witness James Castrol, to tell that John Coady had told him within a year of his death his lungs were weak; while we believe that one of the exceptions to the ordinary rule, excluding hearsay evidence is, "that a declaration is deemed to be relevant if the declarant had peculiar means of knowing the matter stated, if he had no interest to misrepresent it, and if it was opposed to his pecuniary or proprietary interest." Stephens' Digest of Law and Evidence, 81.

Or. as stated in Greenleaf on Evidence, Vol. 1, Sec. 181, to be as follows: "In some cases, the admissions of third persons, strangers to the suit, are receivable. This arises when the issue is substantially upon the mutual rights of such persons at a particular time; in which case the practice is, to let in such evidence in general as would be legally admissible in an action between the parties themselves." John Frieberg et al. v. James H. Donovan, 23 Ill. App. 58, and cases therein cited.

But the declaration of John Coady, sought to be thus shown, does not come, we think, within this exception to the ordinary rule, for at the time he made the offered statement, there is not shown to have existed between him and the appellant such mutual rights as would make it against the pecuniary interest of John Coady to say he had weak lungs, for if it were true he did then have weak lungs, that fact would not lessen in any way, the pecuniary interest that John Coady then had in the certificate or policy sued

on in this case; since whether he then had or had not weak lungs, in nowise increased or diminished the amount of the premiums or assessments he had to pay thereon, nor prevented or enabled him to increase or decrease any benefits which would or could accrue to him under this certificate or policy.

As to the complaint of the appellant that the court refused to allow the witness, Dr. Sims, to answer this question, as counsel have it in their brief, "What would you say, Doctor, of a fall of that character, and the person falling over a rail and a healthy person, whether a fall of that kind would produce death?" we find the record shows the following questions put to Dr. Sims, his answers and the rulings of the court:

"Q. Doctor, suppose that a man running, and in running should throw up his hands in this position (indicating) and fall forward across a railroad, and then a few minutes after such a fall should be found dead with the blood oozing from his nose and mouth, and having run over his face and chin, what, in your opinion, would be the occasion of that man falling in that position? A. Well, now, it would be only how hard he fell; I would say this, if the fall didn't show any external injury—

Objected to by the plaintiff.

Q. Well, adding to the question, and the fall showing no external injury whatever on the person—rolling before he fell, or at the time he fell? A. Now read the question please.

Question objected to by the plaintiff; objection overruled; exception by the plaintiff.

(Question read to witness by reporter under direction of court.)

A. I don't know whether I get the gist of the question; if it is not too much trouble, read it again.

Court: Well, it has been stated twice and read once.

A. Where there was no external injury, I would say the fall did not produce death.

Q. What would you say, Doctor, of a fall of that character, and the person falling over a rail, in a healthy person, whether a fall of that kind would produce death?

Objected to by the plaintiff.

A. I would have to give the same answer as I did to the other.

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Objection sustained; exception by the defendant.

So the record shows that Dr. Sims did, in fact, answer the question, and appellant made no motion to exclude his answer, hence is in no position to make the complaint which is urged, even if the question was a proper one.

The appellant also complains of the court giving improper instructions, but a careful reading of those given, of which complaint is made, shows that none of them are reasonably calculated to mislead or prejudice the jury in any way against the appellant.

And as to the refused instructions complained of, we are satisfied they were properly refused, because the court did, in fact, give full and clear instructions for the appellant upon all phases of the case that the issue and evidence presented; and, besides, when all the instructions given are considered together as one charge, they fully, fairly and clearly gave the law of the case arising from the issue and evidence.

Lastly, the appellant insists that on the whole record it does not satisfactorily appear that the death of John Coady was solely caused by bodily injuries effected through external, violent and accidental means, which was manifested by an external and visible sign, as required by the express terms of the contract of insurance sued on; but that from all the evidence when fully and fairly considered, it does, in fact, fairly appear that his death was partially, if not solely caused by his excessive exercise, which, owing to the diseased condition of his lungs, broke a blood vessel, producing hemorrhage, and that the loss of blood occasioned thereby, caused his death. And as the contract of insurance sued upon only indemnifies against accidental death, caused by involuntary, external, violent and accidental means, which leaves visible external signs; therefore the verdict is against the evidence when applied to the contract sued upon.

We think the contract of insurance, sued on in this case, was issued and accepted for the purpose of indemnifying John Coady, for the benefit of his wife, against accidental

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death caused by accidental means, and that in giving construction to the contract, all the language used therein must be construed with reference to fairly accomplishing the purpose designed. *Healey v. Mutual Accident Association*, 133 Ill. 556.

It is also proper that all the language used in the contract of insurance must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, the claim to the indemnity which, in making the insurance, it was his object to secure; and when the words used are, without violence, susceptible of two interpretations, that which will sustain his claim and cover the loss, must, in preference, be adopted. *May on Insurance*, 2d Ed., Sec. 175.

Construing the contract of insurance in this case by the foregoing well-established rules of construction, and applying the ultimate facts fairly deducible from the evidence in this record, we feel compelled to hold that the death of John Coady was solely produced by an accidental fall on the rail of the railroad track, which was an external and violent force, that left on his body a bruise, which was a visible sign that force had been used.

While it is true that had John Coady been a more robust and sound man, this fall may not have produced his death, yet as he was shown to have been strong and sound enough to have satisfactorily discharged the duties of flagman and freight-handler for the "Big Four Railroad Company" for more than two years immediately preceding his death; and the fact that an eye witness saw that he stumbled and fell when running; and the mark found on one of his shoes after his death, together with the position of his body with reference to his dinner pail and the papers he carried in his hands, when taken together, almost conclusively show that he received a very violent fall from having stumbled while running from an impending storm; and as he died immediately thereafter, bleeding profusely from his mouth and nose, induces a reasonable person to conclude that his death at that time was caused solely from the fall, and was accidental within the meaning of the certificate or policy.

Believing as we do, that on the whole record the verdict and judgment are right, we affirm it. Judgment affirmed.

(Justice WRIGHT heard this case in the Circuit Court, but took no part in its decision in this court.)

Wabash, St. L. & P. R.R. Co. v. Adolph J. Kastner.

1. **MASTER AND SERVANT—*Apparent Risks of the Service—Knowledge of Defects.***—A servant entering into an employment which is hazardous, assumes the usual risks of the service and those which are apparent to ordinary observation; and when he continues in such employment with knowledge of the character of defective structures and of the dangers which may be apprehended, he assumes the hazards incident to the situation.

2. **SAME—*Continuing the Use of Defective Appliances After Knowledge.***—If a servant discovers that machinery used in his employment is out of order and dangerous, and does not discontinue the use of the same, giving the proper notice thereof, wait until it is put in proper condition, and is injured by continuing to use the same, or if the injury is occasioned by his careless use, or want of reasonable care, the fault will be his, and the employer, not in fault, will not be liable to him for such injury.

3. **SAME—*No Recovery After Knowledge of Defects.***—An employe can not recover for injuries suffered in the course of the business about which he is employed from defective machinery used therein, if he continues his work after he has knowledge of the defect.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Pike County; the Hon. THOMAS N. MEHAN, Judge, presiding. Verdict and judgment for plaintiff. Error by defendant. Heard in this court at the November term, 1898. Reversed and judgment in this court with a statement of facts. Opinion filed February 7, 1899.

GEO. B. BURNETT, attorney for plaintiff in error.

A. G. CRAWFORD, attorney for defendant in error.

MR. PRESIDING JUSTICE BURROUGHS, delivered the opinion of the court.

This was an action on the case by Adolph K. Kastner as plaintiff, against the Wabash, St. Louis & Pacific Railroad

Company as defendant, in which was rendered a verdict and judgment of \$5,000 in favor of the plaintiff, from which the defendant prosecutes a writ of error from this court to reverse, claiming that the Circuit Court of Pike County, where the case was tried, erred (1) in refusing to give proper instructions asked by the defendant; (2) in giving improper instructions at the instance of the plaintiff; and (3) in denying defendant's motion for a new trial.

The grounds of complaint stated in plaintiff's declaration are: first, that the engine had no hand-holds upon it; second, that the track was defective and caused the engine to jolt, whereby plaintiff fell off, and as there was a space between the ends of two of the rails of the track where he fell, his arm was caught therein and so crushed by the wheels of the cars that it had to be amputated.

The evidence shows that the plaintiff was in the employ of the defendant as a brakeman upon a train running between Pittsfield and Pittsfield Junction, a distance of six miles, and had been so employed continuously for a period of eighteen months. The engine in use when the accident happened, was the same one used on this run during the whole time of plaintiff's employment, except for a short time when it was in the shops for repairs. The business of this train required the employes operating it to use the track and side track between Pittsfield and Pittsfield Junction five times a day, and the plaintiff states in his testimony that he was familiar with the condition of this engine and track before he was injured. At the time in question, this engine was upon the side track at Pittsfield Junction, with the front end attached to two freight cars for the purpose of switching them onto the main track and thence onto the Pittsfield branch track. Plaintiff gave the engineer a signal to move ahead, and as he came on, the plaintiff discovering a link and coupling-pin lying upon the ground near him, which weighed about fifteen pounds, and knowing he needed them for use at Pittsfield, he picked them up, and as the engine and cars were passing him, he stepped between the engine and the car to which it was attached, and attempted

to step upon the lower slat of the pilot, so as to put the link and coupling-pin upon the engine to be taken to Pittsfield. As plaintiff attempted to step upon the engine, he tried to grab hold of a projection upon the front of the engine used as a flag-socket, but just at that time there was a jolt of the engine, and he, incumbered with the link and the pin, missed his hold on the flag-socket and fell between the front end of the engine and the car attached to it, and the two cars passed over and seriously injured his left arm so that it had to be amputated. As plaintiff fell, his arm caught in a space between the ends of the two rails of the track and he was, on that account, unable to extricate it in time to prevent the wheels of the cars from passing over it.

Plaintiff testified that he knew the condition of the side track, of the spaces between the ends of the rails, and had frequently observed the jolting of the engine when passing over it at other times, and that he knew before that one on the engine would get jolted all the way down this track. He also testified that he spoke to the engineer of this engine about there being no grab-irons on this engine when it came back from the shop several weeks before this accident, and the engineer told him that he (the engineer) had one and he would take another off the car some other time and put them on; the plaintiff told the engineer that he wanted it on right away and that he wanted the engineer to order grab-irons from Springfield and put on the front end "to go plumb across," and that the engineer told him "he did not believe that they would send him any."

At the close of all the testimony, the defendant requested the court to give an instruction which was in writing and to the effect that the court instructs the jury to find the defendant not guilty, but the court refused to give the instruction and the defendant then excepted; and as plaintiff in error now insists that the court erred in refusing to give this instruction, because the plaintiff can not recover, even assuming that the alleged want of proper hand-holds on the engine, and the rough track, with spaces between the ends of the rails thereof, as set out in the declaration, were fully

proven to exist; as the plaintiff has himself conclusively shown, that he knew all about such defects, before the accident; and by not quitting, but remaining in its employ after such knowledge, had assumed the increased danger occasioned thereby; since he had not been promised by the defendant, or any of its agents having authority to do so, that such defects would be remedied, and thereby induced to remain in its employ. And we are cited to the following cases in support of the contention. *Camp Point Mfg. Co. v. Ballou, Adm'r*, 71 Ill. 417; *Railroad Co. v. Britz*, 72 Ill. 256; *Richardson v. Cooper*, 88 Ill. 270, and *Ames et al. v. Quigley*, 75 Ill. App. 446.

And plaintiff in error further insists that the court erred in not giving this instruction, because the evidence showed conclusively that the defendant, knowing the absence of the hand-holds on the front of the engine, and the condition of the track when he attempted to get onto it while in motion, by stepping onto a slat of the pilot when it was coupled to two cars, was himself so clearly guilty of negligence which directly contributed to the injury of which he complains, that as a matter of law, he was not entitled to recover; nor was he using due care for his safety when injured; and in support of this contention, refers us to *Railroad Company v. Docherty, Adm'r*, 66 Ill. App. 17; *Railroad Company v. Louis*, 138 Ill. 9, and *Chicago City Ry. Co. v. Canevin*, 72 Ill. App. 81.

The defendant in error also, in this connection, calls our attention to the following rule of the company which was in evidence, viz.:

“Every employe is required to exercise the utmost caution to avoid injury to himself or to his fellows, and especially in switching or other movement of trains. Jumping on or off trains or engines in motion, entering between cars in motion to uncouple them, and all similar imprudences are forbidden. Yardmasters, conductors, station agents, trainmasters, foremen, and all others in authority are instructed to enforce this rule and to punish all violations of it. No person who is careless of others, or of himself, will be continued in the service of the company.”

And insists that the defendant in error violated it on the occasion in question.

The defendant in error contends, in justification of the refusal of the Circuit Court to give this instruction, that as the evidence shows the plaintiff, before the accident, did complain to the conductor of this train and the engineer of this engine, because this engine did not have any hand-holds on it, and that the engineer told him he had one hand-hold he would put on and would take another off a car and put on; and that the engineer did put one on the back end, but did not put one on the front end, but plaintiff expected him to, which was the reason he remained in the employ of the company; and that whether or not the plaintiff was or was not using due care for his safety when injured, was a question of fact for the jury, and there was some evidence tending to show he was, at the time in question, using due care.

And the defendant in error also insists that the plaintiff in error, by introducing evidence on the trial, waived its exception on this instruction and cites us to *Wenona Coal Co. v. Holmquist*, 152 Ill. 581; *Kolze v. Jones*, 64 Ill. App. 291; *Martin Emrich Outfitting Co. v. Brown*, 63 Ill. App. 38, and cases cited.

In order to pass upon the question raised by this assignment of error correctly, it becomes extremely important to carefully consider all the facts upon which the defendant in error bases his claim to a right of recovery in this case, and when thus carefully considered, it fully appears from his own testimony that he had full knowledge of all the defects of which he complains long before the accident; that the only promise made to him to remedy any of them was one made by the engineer in charge of the engine that he would put two hand-holds on the engine; but the engineer is not shown to have been charged with the duty of furnishing them and putting them on, or as standing in the relation of vice-principal to the plaintiff, and, therefore, representing the defendant so as to bind it by such a promise. Having the knowledge of these defects of which he complains, it was his plain duty, we think, to quit his employment, and

as he did not do so, but chose to continue, he must be deemed, in law, to have assumed the risk of such defects (Ames et al. v. Quigley, 75 Ill. App. 446), since he has not shown that he was induced by the plaintiff in error (or any of its agents having such authority) to believe that such defect would be remedied. Besides, it seems to us that no amount of argument could satisfy the mind of a reasonable person that the defendant in error was in the exercise of ordinary care for his own safety when he was injured, for when he voluntarily and against the express rules of his employer went between the car and the engine while in motion, with an iron pin and link weighing fifteen pounds in his hand, and attempted to get up on to the pilot of the engine where there were no hand-holds, and the engine jolting over a rough and rugged track, all known and seen by him, it is perfectly apparent that he was risking, needlessly, imprudently and recklessly, his life and limbs under circumstances which any person with ordinary prudence would not do.

All this he did when the evidence shows there was no pressing necessity for it, but it does show that the link and pin could have been put on the engine or in one of the cars, when they were not in motion; and the rule of the company above quoted, expressly forbade his getting on the engine when it is in motion; so that, we think, under all the evidence and the facts and circumstances surrounding the defendant in error, that he chose a very dangerous and reckless method of putting the link and pin on the engine when in motion, in the express disobedience of a rule of his employer, rather than the safe one of waiting until the engine and cars had stopped, from which it is clearly apparent that the court ought not, nor was it justified in letting a verdict stand finding the defendant guilty in manner and form as charged in the declaration. Bartelott v. International Bank, 119 Ill. 259; Offut v. Columbian Exposition, 175 Ill. 472, and cases cited; Railroad Company v. Docherty, *supra*.

This instruction being asked at the close of all the evi-

dence and the ruling of the court in refusing it excepted to by the plaintiff in error, it did not waive its exception by afterward asking other instructions on the merits, as contended for by the defendant in error, and which he insists is so decided in *Kolze v. Jones, supra*; *McCaslon & Co. v. O'Brien, Green & Co., supra*; *Wenona Coal Co. v. Holmquist*, 152 Ill. 581, and *Martin Emrich Outfitting Co. v. Brown*, 63 Ill. App. 38. By a reference to all those cases it will be found that in none of them was the instruction to take the case from the jury, requested to be given at the close of all the evidence, and refused and an exception taken, but on the contrary, such an instruction was asked and refused at the close of the plaintiff's evidence, and after being refused the defendant offered evidence and instructions on the merits, and it was held, thereby waived his exceptions to its refusal; or (as in 152 Ill. 581) made a motion to so instruct and failed to offer a written instruction to be marked "given" or "refused," as required by the practice act. But the decision in the case of *Bartelott v. International Bank*, 119 Ill. 259, is against the contention of the defendant in error on this point and we think is decisive of this question.

As we have come to the conclusion that from the evidence the court committed reversible error in refusing the peremptory instruction to the jury to find the defendant not guilty (*Commercial Ins. Co. v. Scammon*, 123 Ill. 601), as requested after the close of all the evidence offered on both sides, we deem it unnecessary to discuss the other errors assigned except by saying that they were well assigned, and the record shows the court erred in each particular, as claimed by the plaintiff in error, and its judgment is therefore reversed and the cause will not be remanded.

We therefore (under authority of 123 Ill. 601, *supra*.) enter a judgment in this court in this case for the plaintiff in error against the defendant in error in bar of this action and for the costs in this court. Judgment reversed.

FINDING OF FACTS TO BE INCORPORATED IN THE JUDGMENT.

We find that the plaintiff in error was not guilty of the

negligence charged in either count of the declaration, in manner and form as therein charged, and we further find that the defendant in error, Adolph J. Kastner, was not in the exercise of due or ordinary care for his own safety when injured, as claimed in his declaration in this case, but that his own carelessness and want of ordinary care, at the time he received the injuries he complains of in this action, caused him then and there to receive them.

Illinois Central Railroad Company v. James D. Louthan.

1. **CARRIERS OF PASSENGERS—*Right to Require Tickets from Passengers Before Entering Cars.***—Carriers of passengers may lawfully require those seeking to be carried, to purchase tickets, when convenient facilities to that end are afforded; to exhibit them to persons designated for that purpose, and to surrender them, after securing seats in the vehicle used for transportation.

2. **RAILROADS—*Duties of Conductors of Passenger Trains.***—The conductor of a passenger train must necessarily have the supervision and control of the train, otherwise there would be no protection to the lives or comfort of the public travel. If he abuses his trust, or for any gross misconduct on the part of himself toward passengers, the company will be responsible.

3. **SAME—*Care on the Part of Employees.***—The law requires the highest degree of care on the part of all railroad employes on passenger trains, for the comfort and safety of passengers, and it is incumbent on them to be civil and decorous in their conduct toward them.

4. **SAME—*Responsibilities of Passengers.***—It is the duty of passengers to observe proper decorum, and be submissive to all reasonable rules established by the carrier. The law will not permit a passenger to interpose resistance to every trivial imposition to which he may really feel or imagine himself exposed by the employes of a carrier. It is due to good order and comfort of the other passengers, that he should submit for the time being, and redress his grievances by civil action afterward.

5. **PASSENGERS—*Rights of—Resistance.***—A passenger will be entitled to as much damage for a wrong or injury quietly endured as violently resisted. Whatever personal injuries may result from his resistance should be attributed to his own want of subordination, for which the law affords him no redress. A passenger has no more lawful right to redress by his own strong arm what he may deem an annoyance committed by a railroad employe, than he has to resist in like manner any other supposed invasion of his convenience or rights.

6. **CERTIFICATE OF IMPORTANCE**—*When it Will be Refused.*—When from the evidence as disclosed by the record the court is unable to discover that there are involved questions of law of such importance, either on account of principal or collateral interests, that they should be passed upon by the Supreme Court, and they have not been settled by that court, the certificate of importance will be refused.

Trespass, for assault and battery. Trial in the Circuit Court of Coles County; the Hon. HENRY VAN SELLER, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the November term, 1898. Reversed, and judgment for defendant in this court with a finding of facts. Opinion filed February 7, 1899. Certificate of importance denied, March 3, 1899.

CLARK & SCOTT, attorneys for appellant.

A railroad company has a right to make reasonable rules for the conduct of its employes and for the conduct of passengers. *C., B. & Q. R. R. Co. v. McLallen*, 84 Ill. 116. And it is the duty of the passenger to inform himself thereof. *Southern Kansas R. Co. v. Hinsdale*, 38 Kas. 507; 34 Am. and Eng. R. Cas. 356 and 391. And the purchaser of a ticket is bound to inform himself. *McRae v. Wilmington R. Co.*, 88 N. Car. 526; 43 Am. Rep. 745. And one who neglects to inform himself has no greater right under his ticket than if he had acquired actual knowledge. *Lake Shore, etc., R. Co. v. Rosenzweig*, 113 Pa. St. 519; 36 Am. and Eng. R. Cas. 489.

JAMES W. & EDWARD C. CRAIG, attorneys for appellee.

The appellee is entitled to recover such damages as he sustained on account of the delay occasioned by the expulsion, and additional expense necessarily occasioned thereby, as well as reasonable damages for the indignity in being expelled from the train. *Pa. R. R. Co. v. Connell*, 127 Ill. 419.

The rule is well stated in the case of *L. E. & W. R. R. Co. v. Christison*, decided in this court (39 Ill. App. 495). It was there said: "It is objected that the court advised the jury, in substance, that if the defendant was liable the plaintiff was entitled to recover not only the actual damages sustained, but damages for the indignity he suffered, if any

such was shown by the evidence, and that in this there was error because damages for indignity are punitive in their nature, and whether punitive damages are allowable is for the jury, a plaintiff never being entitled to merely punitive damages, as a matter of right. Punitive damages are admissible where the injury is wantonly inflicted and are visited upon the wrong-doer by way of mere punishment, regardless of the amount of damages actually sustained. The indignity suffered by reason of the unlawful act of another, is a proper subject of compensation whether the act was wanton, malicious or willful, or whether it was merely negligent or mistaken. The suffering thereby occasioned is not to go unrequited, however, because there is no improper motive or purpose, and is a ground of damage quite apart from the matters which distinctly give rise to punitive damages." *C. & A. R. R. Co. v. Flagg*, 43 Ill. 364.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

The appellee, as plaintiff, sued the appellant, as defendant, in the Circuit Court of Coles County, where at the first trial the jury failed to agree upon a verdict, and on the second trial by jury, a verdict was rendered for the plaintiff for \$250 and judgment given him therefor.

The appellant brings the case to this court by appeal, and urges us to reverse that judgment on the grounds that the Circuit Court erred in its rulings on the evidence, its instructions to the jury, and in overruling the motion of the defendant for a new trial.

The declaration contained two counts, the first being in case, and charges that on May 31, 1896, the plaintiff, having purchased a ticket from Arcola to Champaign and return, started to board the train at Champaign, which the defendant, by its agent and servant, attempted to prevent him from entering, laid his hands on him, although he informed him that he had procured a ticket for passage on said train, and upon plaintiff's endeavoring to enter the train, the said servant violently seized hold of him, threw him down, and

willfully, wantonly and severely beat, bruised and wounded him, in the presence of other passengers.

The second count is in trespass, and charges that on May 31, 1896, the defendant, with force and arms, in the county of Champaign, by its agent and servant, willfully and wantonly assaulted the plaintiff, and beat, bruised and wounded him, and claimed \$1,000 damages therefor.

The defendant interposed to the declaration a plea of not guilty, upon which issue was joined.

The evidence shows that James D. Louthan, the plaintiff, purchased a ticket from Arcola, Illinois, to Champaign, Illinois, and return, over the Illinois Central Railroad Company's road, and on May 31, 1897, he rode upon it from Arcola to Champaign. The "Wild West Show" was at the latter city that day, and it being also "Decoration Day," there was a large number of persons at the depot of the defendant, to take its train, which left Champaign about midnight, that night; and as it passed through Arcola, the plaintiff sought to take that train, to return on, and to use the return part of his ticket, which he seems to have had in his inside vest pocket.

When this train stopped at the station, at Champaign, a colored porter in the service of the defendant on the train was stationed on the platform, near the steps leading into the car, and demanded of persons wishing to get on the train to show him their tickets before getting on; and his request was being complied with by the persons he allowed to get on. The plaintiff, although requested by this porter to show his ticket the same as others, refused to show it, and against the protest of the porter, passed him and went up the steps onto the platform of one of the cars; and while going through the door of the car, some one took hold of him and a scuffle ensued, he insisting that he had a ticket and would show it when he got inside. He succeeded in getting inside, and when there, did show his ticket, and was permitted to ride to Arcola without further trouble. In this scuffle, it seems he was requested to show his ticket or get off the train; and while he claims that by reason of the

scuffle he was so shaken up as to make him feel the effects thereof for some time thereafter, no bruises or wounds of any kind were inflicted upon his person, nor was any of his clothing torn or injured.

There is a serious conflict in the evidence, as to whether the man on the train that engaged the plaintiff in this scuffle, was, in fact, one of the servants or employes of the defendant, and the evidence tends to show very strongly that he was not.

When fully considered, we are satisfied that the evidence fully established the fact that the servants and employes of the defendant did nothing more, under the circumstances, than try to prevent, in a reasonable way, the plaintiff from getting on to this train until he showed he had a ticket to ride thereon; and when he was politely requested by the porter to show his ticket before getting on the train, it was his duty to comply with the request; but as he refused to do so, and proceeded to get on the train, the employes were justified in using such force in reason, as would prevent his getting on; for it is "well recognized law, that carriers of passengers may lawfully require those seeking to be carried to purchase tickets, when convenient facilities to that end are afforded by the carrier, to exhibit them to persons designated by the carrier for that purpose, and surrender them after securing their seats in the car, or other vehicle used for transportation. Such requirements cause but little, if any, inconvenience to the public, and may be indispensable to enable the carrier to protect himself against loss through the knavery of dishonest employers." *Pullman Palace Car Co. v. Reed*, 75 Ill. 125.

The evidence clearly shows that the force used by the servants of the appellant in trying to prevent the plaintiff getting into the car, on account of his refusal to show his ticket before getting on, as requested, was not sufficient to prevent his going into the car as stated by himself; and the scuffle complained of could, and doubtless would, have all been avoided by his merely showing his ticket upon request, as was his plain duty under the law; and whatever indignity

he suffered from being taken hold of and pulled around was done in an honest effort to prevent his getting into the car of the train without first showing his ticket, as politely requested; and was the result of his own voluntary and wrongful act in violating a reasonable regulation, which the defendant had a right to make and enforce. *Pullman Palace Car Co. v. Reed, supra.*

As the verdict and judgment in this case are, in our opinion clearly against the law and the evidence, it renders it unnecessary for us to discuss the rulings of the trial court upon the evidence or instructions that are complained of. And as the evidence in this record shows that the plaintiff in the court below (appellee here) failed to prove his case, under either count of his declaration, we will reverse the judgment appealed from, and not remand the case, and will render judgment in this court in favor of the appellant in bar of the action, and for the costs in this court, with findings of facts, as indicated below. Judgment reversed.

FINDINGS OF FACTS TO BE INCORPORATED IN THE JUDGMENT.

The court finds from the evidence that the appellant, by its servants and agents, did not violently seize hold of and throw the appellee down, and willfully, wantonly and severely beat, bruise and wound him in the presence of other passengers, or otherwise wrongfully beat and bruise him, in manner and form as he, in his declaration, complains, but only attempted, without success, in a reasonable manner to prevent him from entering its train on account of his wrongfully refusing to show his ticket, upon reasonable request, before attempting to enter its train.

(Justice WRIGHT, having presided at the first trial of this case in the Circuit Court, took no part in disposing of this case in this court.)

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court, on application for a certificate of importance.

The appellee, by his counsel, has applied to us for a certificate of importance in this case. And it is, insisted there

are involved in this case questions of law of such importance, both on account of principal and collateral interests, that it should be passed upon by the Supreme Court; and "that there is no decision of the Supreme Court of the State of Illinois, as far as appellee or his counsel know, which decides the question in relation to the enforcement of the rule as to passengers displaying tickets before they enter the cars of a railroad company, and that question should be passed upon by that court."

We would not hesitate one moment to grant the certificate of importance applied for, if we believed that the question which counsel for appellee specially seeks to have passed upon by the Supreme Court in this case, had not in effect already been decided by that court, in the cases we will now refer to, viz.: In *Pullman Palace Car Co. v. Reed*, 75 Ill. 125, the court says: "It is well recognized law that carriers of passengers may lawfully require those seeking to be carried, to purchase tickets, when convenient facilities to that end are afforded by the carrier for that purpose, to exhibit them to persons designated by the carrier for that purpose and surrender them, after securing their seats in the car or other vehicle used for transportation." (Page 130 of the opinion.) In that case Reed had purchased a ticket for a particular berth in a sleeping car and had lost it after entering the car. He refused to pay a second time and was forcibly expelled, after producing proof that he had purchased a ticket for a berth. And the court says: "Under the circumstances, we are of opinion appellee is only entitled to recover the price paid for his ticket, and a reasonable compensation for the trouble and inconvenience he suffered by being deprived of his berth in the sleeping car." (See page 132 of opinion.) And it reversed a judgment rendered on a verdict awarding \$3,000 damages in that case. In the case of *Chicago, Burlington & Quincy R. R. Co. v. Griffin*, 68 Ill. 499, the court says: "If a passenger pay his fare to a certain station, and the ticket agent inadvertently gives him a ticket to an intermediate station, the demand of a fare the second time by the conductor will be a breach of

the implied contract on the part of the company to carry him to the proper station. By paying on such demand his action will be as complete as if he resists the demand and suffers himself to be ejected, and his ejection in such case will add nothing to his cause of action. It is his duty to pay the fare demanded, and if the company fails to make suitable reparation for the indignity, he can maintain his appropriate action." In that case Griffin was forcibly ejected from the cars by the employe of the railroad company, and his action was trespass to recover damages for the indignity and injuries suffered thereby; and the court found that the evidence showed that the agent of the railroad company had by inadvertence given him a ticket to an intermediate station, when he had paid fare to the station of his destination, and supposed he had been given a ticket thereto, and so told the conductor when he demanded the additional fare from the station to which the ticket read to the station of his destination; upon refusal to pay the conductor the additional fare, he forcibly put him off the train, using no more force than was necessary to overcome the resistance, but there was considerable violence on the part of both. Under such state of facts the court used the language above quoted, and on page 504 of the opinion further says :

"The conductor must necessarily have the supervision and control of the train, otherwise there would be no protection to the lives or comfort of the public travel. If he abuses his trust, or for any gross misconduct on the part of himself or other employes toward passengers, the company will be responsible.

"The law requires the highest degree of care on the part of all railroad employes on passenger trains, for the comfort and safety of passengers. It is incumbent on them to be civil and decorous in their conduct toward them. But like responsibilities rest upon the passengers. They must observe proper decorum, and be submissive to all reasonable rules established by the company. The law will not permit a passenger to interpose resistance to every trivial imposition to which he may really feel or imagine himself exposed by the employes, that must be overcome by counter force in order to preserve subordination. It is due to

good order and comfort of the other passengers, that he should submit for the time being, and redress his grievances, whatever they may be, by civil action. A party will be entitled to quite as much damage for any wrong or injury quietly endured as if violently resisted; indeed the policy of the law ought to be to award him a higher measure of damages. Whatever personal injuries may result from his violence, should be attributed to his own want of subordination, for which the law will afford him no redress. He has no more lawful right to redress by his own strong arm what he may deem an annoyance committed by a railroad employe, than he has to resist in like manner any other supposed invasion of his convenience or rights. The courts afford opportunity to redress every civil injury, no matter what its character, and the party must pursue the remedy given by law."

And in that case the court reversed a judgment rendered on a verdict awarding \$1,500 as damages, saying:

"The damages awarded are out of all proportion to any injury inflicted upon appellee by the employes of the company, other than what must be attributed to his own misconduct in opposing with force the demands made upon him by the conductor, which he must have known, if they were wrong, they arose out of honest mistake, either on his part or that of the ticket agent."

In the case of *Chicago & Alton R. R. Co. v. Flagg*, 43 Ill. 365, Flagg sued the company in an action on the case for wrongfully expelling him from one of its freight trains for not having a ticket. He tendered his fare when the ticket was demanded, but the conductor refused to receive it and put him off, in pursuance of a rule of the company requiring those riding on freight cars to have tickets, and prohibiting conductors from receiving cash fares. The court says:

"It is urged that the company must have power to make reasonable rules for the government of its trains. Undoubtedly; and if a company deem it advisable to require tickets to be purchased before taking passage on certain classes of trains, its authority to do so must be conceded. If its rules in this respect are knowingly disregarded, a passenger may be required to leave the train at any regular station."

And in that case the court sustained a judgment on a verdict awarding \$100 damages because Flagg offered to pay fare and accounted for not having a ticket by reason of there being no agent to sell him one at the station he got on, and further because the conductor put him off the train at a "water tank" instead of a regular station, as required by statute. And it also appeared that Flagg obeyed the conductor by getting off when requested, and made no resistance whatever. See also *Illinois Central R. R. Co. v. Johnson*, 67 Ill. 312; *Same v. Cunningham*, 67 Ill. 316; *Terre Haute, Alton & St. Louis R. R. Co. v. Vanatta*, 21 Ill. 188; *Chicago & Alton R. R. Co. v. Roberts*, 40 Ill. 503.

In the case of *Pennsylvania R. R. Co. v. Connell*, 112 Ill. 295, Connell sued the company to recover damages for a forcible expulsion from its car when he refused to pay his fare, but tendered a ticket issued to him by the Wabash railroad for a ride over the Pennsylvania railroad, which the conductor refused to receive, claiming his company had not authorized the ticket to be so issued. The trial court instructed the jury on the measure of damages that Connell was entitled to recover compensation for loss of time, or actual loss, as the result of being forcibly ejected from the train; also, such sum as will compensate for injuries to the person, resulting from being forcibly ejected from the train, and for bodily pain; and the court, at page 305 of the opinion, says:

"When the conductor demanded that appellee should pay fare or leave the train, he would have been justified in refusing to pay fare, and in leaving the train on the command of the conductor, and had he done so he would have received no personal injuries, and might then have brought his action and recovered as above stated (the amount of the cost of a ticket from the place he was ejected from the car to the place he had purchased his ticket, and damages for delay); but when he refused to leave the train and thus compelled the conductor to resort to force, he can not recover for an injury which he voluntarily brought upon himself. The conductor was ordered by his superior not to receive a ticket like the one presented. This order he was

I. C. R. R. Co. v. Louthan.

bound to obey, and so far as appears he acted in good faith, and when appellee was notified by the conductor that his ticket was not good, and would not be received, it was his duty to leave the train in a peaceable manner and hold the company responsible for the consequences, rather than resist or undertake to retain his place on the train by force. A train crowded with passengers, often women and children, is no place for a quarrel or a fight between a conductor and passenger, and it would be unwise and dangerous to the traveling public to adopt any rule which might encourage a resort to violence on a train of cars. The conductor must have the supervision and control of his train, and a demand on his part for fare should be obeyed, or the passenger should, in a peaceable manner, leave the train and seek redress in the courts, where he will find a complete remedy for indignity offered, and for all damages sustained."

In that case the court refers approvingly to the Griffin and Reed cases, *supra*, and reverses the judgment for \$15,000 damages, for the reason that the instruction as to the measure of damages was erroneous. And it was also expressly held that the appellee could recover all damages he sustained by reason of the conductor wrongfully requiring him to leave the train when he was entitled to ride, but he could not recover for the force used by the conductor, and which the appellee induced by resisting being put off, unless the force used was more than necessary to put him off, or was wantonly or willfully inflicted.

Hence it seems to us that our Supreme Court has fully decided that in this State it is the duty of a passenger seeking to be carried on a train to conform to such reasonable requests as the conductor or servant in charge of the train makes upon him, when an honest difference arises between them as to his right to ride on such train; and in case such passenger forcibly resists the enforcement of such requests, he will be precluded from recovering any damages for injuries inflicted upon him by such forcible resistance, unless the conductor or servant uses excessive force, or acts in a wanton or willful manner.

From the evidence in the record in the case at bar it seemed to us that we so held; that the conductor in charge

of appellant's train did not use any excessive force nor did he act in a wanton or willful manner when he attempted to prevent the appellee from entering the car in question, without showing his ticket; and the appellant was in fact permitted to ride on the train to his destination, and if injured at all, as claimed, was so injured on account of the forcible manner he came onto the train against the reasonable resistance of the conductor, while in good faith attempting to prevent him from getting on the train, when he failed to show his ticket on request.

Believing the evidence in this record discloses the facts to be as found by this court and recited in its judgment, we are unable to discover that there are involved in this case, questions of law of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, and have not yet been settled by that court; because we are of the opinion that every legal question arising on the facts in this case has been settled by that court in the cases above cited and quoted from, and is in accord with other high authority, notably: *Frederick v. M. H. & O. R. R. Co.*, 37 Mich. 342; *Townsend v. N. Y. C. & H. R. R. Co.*, 56 N. Y. 298; *Hibbard v. N. Y. & E. R. R.*, 15 N. Y. 470; *Bennett v. N. Y. C. & H. R. R. Co.*, 5 Hun, 600; *Downs v. N. Y. & N. H. R. R.*, 36 Conn. 287; *Shelton v. Lake Shore, etc., Ry. Co.*, 29 Ohio St. 214, and *McGowen v. M. L. & T. R. & S. Co.*, 41 La. Ann. 732. (See 5 L. R. A. 817 and notes.)

We therefore refuse to grant the certificate of importance as petitioned for.

Mr. Justice HARKER concurs.

Mr. Justice WRIGHT took no part.

The Rock Island Lumber Co. et al. v. E. T. Lister.

1. **EQUITY PRACTICE—*Finding of the Master.***—The finding of the master is entitled in this court to the same consideration and weight as are to be attributed to the verdict of a jury.

Bill of Interpleader.—Trial in the Circuit Court of Sangamon County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Hearing and decree; appeal, etc. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

McENIRY & McENIRY and TIMOTHY McGRATH, attorneys for appellants.

WM. F. HERNDON, attorney for appellee.

MR. JUSTICE WRIGHT delivered the opinion of the court. The Home Building and Loan Association filed its bill of interpleader against the appellants, the Rock Island Lumber Co. and J. H. Feltham, appellee, and others, to require them to settle and adjust their respective demands to \$320 in its hands, which it was ready and willing to pay to such claimant as might be adjudged entitled thereto. Issues were formed between the respective parties, and the cause was referred to the master to take the evidence and report the same to the court with his conclusions of law and fact. The master reported his findings, to the effect that the appellant Rock Island Lumber Co. was entitled to \$183.32 of such sum, and the appellee the residue, \$136.68, and the court, after overruling appellants' exceptions to such report, approved the same, gave its decree in accordance therewith, from which appellants prosecute this appeal, contending that the finding of the master and the decree are not supported by the evidence.

It appears from the evidence that appellee made a written contract with appellant Feltham to build a house for \$1,600, eighty per cent of the contract price to be paid from time to time as the work progressed, the residue to be paid on com-

pletion of the work. In case of failure to complete the work as agreed, the contractor to pay \$1 each day as liquidated damages during the delay. Lister, as contractor, engaged the appellant Rock Island Lumber Co. to furnish certain materials for the construction of the house within a reasonable time, which it failed to do, in consequence of which appellee was compelled to and did get the same elsewhere, and for that reason was much delayed and damaged in the performance of his contract. The Home Building and Loan Association loaned to appellant Feltham \$2,000 for the purpose of constructing the building, a balance thereof of \$320 being still in its hands at the time of the filing of the present bill, the right to which constitutes the controversy involved in this proceeding.

The finding of the master is entitled in this court to like consideration and weight as would be attributed to the verdict of a jury; and upon a review of the evidence in the case we think such finding is supported thereby and is in accordance with substantial justice between the parties in interest, and the decree of the Circuit Court will therefore be affirmed. Decree affirmed.

Hulman & Co. et al. v. J. B. McBryde & Co. et al.

1. **FRAUDULENT CONVEYANCES—*Void as Against Creditors.***—Every conveyance or transfer of any real estate or personal property, or any rent or profit of either, made with intent to disturb, delay, hinder, or defraud creditors or other persons, and every evidence of debt given, suit commenced, decree or judgment suffered, with like intent, is void as against such creditors or other persons.

Bill of Discovery and Creditor's Bill.—Trial in the Circuit Court of Clark County; the Hon. HENRY VAN SELLER, Judge, presiding. Hearing and decree for complainants; appeal by defendants. Heard in this court at the November term, 1898. Reversed and remanded. Opinion filed February 7, 1899.

ROBERT E. HAMILL and GOLDEN, SCHOLFIELD & BOOTH, attorneys for appellants.

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Every conveyance is void as to creditors if the grantor reserves a beneficial interest or if a trust be created. *Beidler v. Crane*, 135 Ill. 92; *Bostwick v. Blake*, 145 Ill. 55; *Mel. Com. Works v. Belleville Glass Co.*, 34 Ill. App. 404; *Calef v. Parsons*, 48 Ill. App. 253.

It will make no difference that the reserved benefit is for a valuable consideration if the transfer places the property beyond the reach of creditors and gives the debtor what belongs to them. *Rutt v. Shuler, Adm'r*, 49 Ill. App. 655.

And a secret understanding between the grantor and grantee for the accounting of the proceeds renders the conveyance void. *Rigor et al. v. Simmons*, 47 Ill. App. 428.

A deed is not good if given for a pre-existing debt which is afterward treated by the parties as still due. *Wait, Fr. Con.*, Sec. 223, page 397, citing *Oliver v. Moore*, 23 Ohio St. 479; *Oakford & Fahnestock v. Dunlap*, 63 Ill. App. 498; *Priest v. Conklin*, 38 Ill. App. 180.

The grantee in such a conveyance is a trustee for creditors. *Reiss v. Hanchett*, 141 Ill. 419.

A creditor can not purchase the goods of the debtor at a price in excess of his debt when he knows that the excess so paid such debtor is by the latter to be placed beyond the reach of his other creditors. Such purchaser is a participant in the fraud of his debtor, whether his purpose be to aid him or not. 8 Am. & Eng. Ency. of Law, 769, note 4; *McVeagh v. Baxter*, 82 Mo. 518; *Olmstead v. Mattison*, 45 Mich. 617.

Every conveyance is fraudulent and void where the grantee has knowledge, or notice to put him upon inquiry, as to the fraudulent intent of the grantor, although for a valuable consideration. Ch. 59, Sec. 45, R. S. Ill.; *Power v. Alston et al.*, 93 Ill. 587; *Beidler v. Crane*, 135 Ill. 92; *Mathews v. Reinhardt*, 149 Ill. 635.

GRAHAM & TIBBS, attorneys for appellees.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This is an appeal prosecuted by the appellants, Hulman

& Co. and Carson, Pirie, Scott & Co., to this court, from a decree rendered by the Circuit Court of Clark County, in favor of the appellees, J. B. McBryde & Co. et al., after a hearing in the consolidated cases of the appellants and others against the appellees, being a number of creditors' bills, with averments of concealment of property and effects of said J. B. McBryde & Co., by the defendants in said bill named, and praying for discovery of such concealed property and effects, so that satisfaction of the judgments held by the appellants and the other creditors, respectively, against said J. B. McBryde & Co., could be had.

The bill of Hulman & Co. was filed December 26, 1896, and set up that the complainants had, on December 10, 1896, recovered, in said Circuit Court, a judgment against J. B. McBryde and W. E. McBryde, a firm doing business as J. B. McBryde & Co., for \$738.10, on which an execution was issued to the sheriff of Clark county, Illinois, and return, December 18, 1896, "no property found, execution not satisfied;" that the claim of complainants, on which said judgment was rendered, was owing them by J. B. McBryde & Co., long prior to November 25, 1896; and that on or about that date J. B. McBryde & Co. made a sale of their stock of goods to one W. G. Hersig, a son-in-law of J. B., and a brother-in-law of W. E. McBryde, for an inadequate consideration, and on the agreement of said Hersig that he would pay certain debts then owing by J. B. McBryde & Co., among which was the claim of the complainants; that the sale of said stock of goods was for the express purpose of hindering and delaying, as well as to defraud the complainants and other creditors of J. B. McBryde & Co., in collecting the claims owing them by J. B. McBryde & Co.; that Hersig had not paid complainants the indebtedness owing them by J. B. McBryde & Co., but had failed and refused to do so, notwithstanding the fact that he was selling out said goods and appropriating the proceeds thereof to his own use.

The bill further alleged that as a part of the pretended consideration of the sale of the stock of goods, J. B. Mc-

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Bryde had in his possession and held a certain note of W. G. Hersig, due thereafter, for \$305.30; and that said note, and others in the possession of the defendants to the bill, were assets of J. B. McBryde & Co., which in equity should be subjected to the payment of their debts. The bill required answers under oath, prayed for a disclosure of all property, or the proceeds thereof, in the hands of, or under the control of each of the defendants and belonging to J. B. McBryde & Co., so that their creditors might resort thereto and collect the claims owing them by McBryde & Co.

In addition to the other relief sought in the bill, the complainants prayed for and obtained, on December 26, 1896, a temporary injunction, restraining J. B. and W. E. McBryde from selling, assigning, incumbering, or in any manner disposing of any property or effects in their possession or under their control, except such as is exempt by law.

On February 24, 1897, John V. Farwell & Co., having a judgment against J. B. McBryde & Co., for \$373; John M. Loake & Co., having a judgment against them for \$278; Isaac Greenfelder & Sons, having a judgment against them for \$178, each filed in said Circuit Court, a creditor's bill; and on March 22, 1897, Carson, Pirie, Scott & Co., also filed in said Circuit Court a creditor's bill on a judgment for \$466.37 and costs against said McBryde & Co., and made some others defendants thereto; all being of the same general tenor as the bill of Hulman & Co., except that the respective judgments in their favor against J. B. McBryde & Co. were of different dates, and in the case of Carson, Pirie, Scott & Co., made one William Abraham, who it averred had bought an interest in the said stock of goods from W. G. Hersig, subsequent to the filing of the bill of Hulman & Co., and C. Fugua & Sons, who it averred had purchased said stock of goods from Hersig & Abraham, on March 5, 1897, were made also defendants.

The record discloses that the temporary injunction was served on J. B. and W. E. McBryde on December 28, 1896, and the summons in the Hulman & Co.'s bill was served on the defendants therein named on December 29, 1896.

W. G. Hersig and other defendants thereto answer these bills under oath, and by express agreement of the parties, no answers were filed by C. Fugua, William Abraham and some other defendants, as without any answers from them, or replications thereto, the other answers and replications were to be considered as adopted by such parties the same as if expressly filed.

The answer of W. G. Hersig filed to the bill of Hulman & Co., as also to the other of said bills, among other things states, that J. B. McBryde & Co. sold their entire stock of goods, etc., to him on November 24, 1896, since which time they have not been engaged in such business. He further therein admits that he is the son-in-law of J. B. McBryde and the brother-in-law of W. E. McBryde, and he denies that the McBrydes, or either of them, have made an assignment or transfer of their property or part thereof to him which was merely colorable, and made with a view of protecting their property or effects, and placing same beyond the reach of complainants' said judgment, and to enable the McBrydes to control and enjoy same and the avails thereof or to hinder or delay complainants in the collection of their debt now in judgment as aforesaid; and it further states that immediately after he purchased said stock of goods from the McBrydes, he went into possession thereof, and on December 22, 1896, he sold so much of said stock of goods as were at Mt. Moriah store to R. F. Fears, for \$544.12, of which \$194.12 is not secured and perhaps not collectible; that on January 18, 1897, he sold the one-half of said stock of goods at Casey to one W. Abraham for \$2,168.84; and that on March 6, 1897, he and said Abraham sold all of said stock of goods to C. Fugua & Sons for \$4,408.50.

His answer further states that he purchased said stock of goods from J. B. McBryde & Co. for \$5,103.60, which was a fair cash value therefor, and at that time J. B. McBryde & Co. were indebted to him for borrowed money, which had been used by them in purchasing goods for said stock, to the sum of \$661.38, which was then due him from them, and he, for the purpose of collecting the same, was induced

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to purchase said stock, and that he paid J. B. McBryde & Co. for said stock of goods in full, the consideration so paid for same being as follows :

“ INDEBTEDNESS ASSUMED.

To Mills & Averill, St. Louis.....	\$ 54 66
To B. L. Adams, Casey.....	57 45
To D. C. Joplin, St. Louis.....	107 00
To Hulman & Co., Terre Haute.....	8 79
To Trolicht, Dunker & Co., St. Louis.....	12 00
To H. Kennedy, Casey.....	68 00
To Standard Oil Co., Elftingham.....	4 02
To Mound City Paint Co., St. Louis.....	23 50
To Charles Johnson, Casey.....	26 50
To Townley Mantel Co., Terre Haute.....	162 95
To David Morton, Louisville.....	61 00
To notes given by J. B. McBryde and W. E. McBryde to W. G. Hersig, then due.....	661 38
To cash paid by Hersig to J. B. McBryde & Co..	569 76”

Notes transferred by him to them, the interest and principal being as follows :

“ To notes on Galeb Case, amount.....	\$ 816 30
To notes on T. M. Smith, amount.....	349 50
To notes on D. F. Moore, amount.....	798 15
To notes on defendant for.....	305 30
To eighty acres of real estate.....	1,000 00”

That he has paid all of the above amounts assumed by him, except the \$107 due D. C. Joplin, and \$61 due David Morton; that said real estate is fairly worth, at a fair cash value, \$1,000 over the incumbrance, by way of mortgage on same; that his said note against them for \$661.38 was due and was a *bona fide* debt, and all the said notes transferred by him to them, were valid notes and worth the full amount expressed in said notes; that he has paid in full for said stock of goods, except his said note of \$305.30 given them by him as aforesaid, and this he expects to pay when it is due by its terms; that the sale to him by J. B. McBryde & Co. of said stock of goods was in absolute good faith and not for the purpose of hindering and delaying their creditors from collecting any debts owing them by the McBrydes.

He further states in his answer, that it was understood and agreed by him and J. B. McBryde & Co., that if he could make arrangements with Hulman & Co. so that they would wait on him until a note given by the McBrydes to them for \$350.12, dated November 15, 1896, and due sixty days after date, was due, then he (Hersig) was to assume and pay same when it was due by its terms; but he avers that Hulman & Co. refused to carry out such arrangement, and insisted that he should sign two notes, each for \$350.12, due to Hulman & Co., and owing by the McBrydes, both of which were judgment notes, which he refused to do, although he offered to give his own note to them for said amount, due at the same time said two notes were, his note not to be a judgment note; but Hulman & Co. refused to take his note therefor, and they took judgment against the McBrydes on these two said notes before the expiration of the sixty days the notes were to run, under the power to confess judgment at any time after their date, contained in said two notes.

The answer further denies that Hersig agreed to assume the debt owing by the McBrydes to Hulman & Co., as stated in their bill.

The answer further states that J. B. McBryde & Co. were indebted to Mrs. J. B. McBryde in the sum of \$947.95 for borrowed money used in their store, and were also indebted to Ernest McBryde for \$305 borrowed money, also used in their store, and out of the consideration received for said stock of goods, they paid those debts.

The answer further denies all the other allegations of the bill, and denies that the complainants are entitled to the relief or any part of same, demanded in the bill, and asks to be dismissed with his reasonable costs, etc. This answer has attached to it the following affidavit:

"STATE OF ILLINOIS, }
Clark County. }

On this 13th day of April, 1897, before me personally appeared W. G. Hersig and made oath that he has read the above answer subscribed by him, and knows the contents thereof, and that the same is true, of his own knowledge,

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except as to matters which are stated on his information and belief, and as to these matters, he believed them to be true.

W. G. HERSIG.

Subscribed and sworn to before me this 13th day of April, A. D. 1897.

B. L. ADAMS,

(SEAL.)

Notary Public."

The McBrydes in their respective answers, confirm the statements contained in the answer of Hersig, and all the defendants disclaim having any property belonging to J. B. McBryde & Co.

All the answers are sworn to by the same form of affidavit as that of Hersig.

In the answers of J. B. and W. E. McBryde, they state in addition to what is stated in Hersig's answer, that they paid out of the consideration received for the sale of their stock of goods, valid indebtedness owing by them to *bona fide* creditors of theirs, all the cash and notes received, but the following:

One note signed by Caleb Case, due August 7, 1896, and one note signed by W. G. Hersig, due December 7, 1898, for \$305.30, both of which he, the said J. B. McBryde, still owns; and that he had when they sold said stock of goods, and he now owns some household and kitchen furniture worth \$150, and real estate upon which he lives with his family, worth \$3,300, which is incumbered by mortgage for \$700, and a balance of purchase money due thereon of \$100, and that the said Marion county eighty acres of land, received as part of the consideration of the sale of said stock of goods, is incumbered by mortgage for \$800; and that W. E. McBryde has household and kitchen furniture, used by him and his family, worth \$175, which is all the property owned now or at time of sale of said stock of goods, by them or either of them.

At the April term, 1897, of the Circuit Court of Clark County, an order was made by that court, that the cases of Hulman & Co. v. J. B. McBryde et al., John V. Farwell & Co. v. same, Carson, Pirie, Scott & Co. v. same, then on the docket of that court, be consolidated and heard as the case of Hulman & Co. et al. v. J. B. McBryde & Co. et al., and

leave was given Frank D. Laura & Co. to join therein as parties complainants; and the cases so consolidated were by the court heard and decree entered therein on April 16, 1898, dismissing all of said bills, with costs to complainants.

The appellants assign as error, that the finding of the court under the evidence, was erroneously for the defendants, when it ought to have been for the complainants; and that the court erred in entering a decree against the complainants for costs.

We have examined with care, the various and lengthy bills of complaint filed herein, and the various answers filed thereto, with the affidavits attached to the same; also the voluminous testimony given on the trial as it appears in the certificate of evidence contained in this lengthy record; and we are satisfied that when all are fairly considered, that it clearly appears that the sale made on or about November 25, 1896, by J. B. McBryde & Co. to W. G. Hersig, of all their stock of goods, was made to, and did hinder and delay the then various creditors of J. B. McBryde & Co. in collecting their valid debts owing them by the McBrydes; and that the consideration paid by W. G. Hersig to the McBrydes was inadequate and consisted in part of real estate, of little or no value, and some notes on persons of questionable responsibility, and not due for some length of time after such sale; that when said sale was made, the property of J. B. and W. E. McBryde remaining, after deducting their exemptions and the incumbrances thereon, was wholly insufficient to pay their debts, all of which was fully known by the son-in-law and brother-in-law, W. G. Hersig, when he bought said stock of goods, and he then intended to aid J. B. McBryde & Co. in their design to hinder and delay such of their creditors as they did not prefer by that sale.

As to the contention of the appellees that their answers were sworn to, and the competent evidence on the trial did not overcome the facts set out therein, we will say, that when the answers and all the testimony is fully analyzed and considered, it fully appears that the Marion county land

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was of little or no value above the two \$400 mortgages on it, while it was conveyed at the price of \$1,000, subject to the mortgages, in the consideration for the stock of goods sold; and that the largest part of the consideration for this stock of goods was notes not due for a long time after the sale, and some of them being on parties living in other and distant States from Illinois.

This case in its facts is a much stronger case of fraud in law than the case of Oakford & Fahnestock v. James Dunlap, 63 Ill. App. 498, and all we said in that case, applies fully to this case.

The defendants below, W. Abraham and C. Fugua & Sons, when they purchased parts of said stock of goods from W. G. Hersig, did so with notice in law of the rights of Hulman & Co. and others, as creditors of J. B. McBryde & Co., to have the sale made by the McBrydes to Hersig, set aside as being fraudulent in law, against them, as claimed by the bill of Hulman & Co., then on file, and the summons issued thereon, served on the McBrydes before they purchased.

We think from the facts disclosed by this record that the findings and decree in this case should not have been against the complainants, as it was; and for that error we reverse the decree of the court below herein, and remand this consolidated cause to the Circuit Court of Clark County, for such other and further proceedings therein, in that court, as to equity and justice appertain. Reversed and remanded.

80	601
184	613

John W. Young et al. v. J. B. Carey et al.

1. **MANDAMUS**—*The Right to the Writ Must be Clear.*—A relator must show a clear right before relief will be granted by the court in a proceeding by mandamus. If the right be doubtful or uncertain the court will not interpose.

2. **SAME**—*Performance of a Public Duty.*—Where the performance of a duty by a public officer is discretionary and depends upon the exercise of his judgment as to its necessity or propriety, the court will not interpose to determine how or when he shall exercise the power, but will

leave him in the free exercise of his discretion to act or not as he deems proper.

8. *SAME — Changing the Boundaries of Villages.* — Whether the boundaries of a municipality should be enlarged or contracted is not a question of law or fact for judicial determination, but purely a question of policy to be determined by the legislative department.

4. *SAME—Does Not Lie to Compel the Trustees of a Village to Alter its Limits.*—The writ of mandamus will not lie to compel the board of trustees of an incorporated village to pass an ordinance disconnecting certain territory when the board had previously decided against disconnecting the territory in question.

Petition for Mandamus.—Trial in the Circuit Court of Montgomery County, on demurrer to answer; the Hon. SAMUEL L. DWIGHT, Judge, presiding. Finding and judgment for respondents; appeal by relator. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 11, 1899.

HOWETT & JETT and J. M. BAKER, attorneys for appellants, contended that the statutory discretion must be exercised for the public good, and should be controlled by judgment and not by passion or prejudice. When a discretion is abused and made to work an injustice it is admissible that it shall be controlled by mandamus. *Village of Glencoe v. The People*, 78 Ill. 388.

The word *may* means *shall* whenever the rights of the public or a third person depend upon the exercise of the power of performance of a duty to which it refers. *James v. Dexter*, 112 Ill. 491.

The petition for mandamus in the case of *Brokaw v. Commissioners*, 130 Ill. 491, brought under section 71 of the Road and Bridge Law, which is apparently discretionary and contains the word *may*, the court in the opinion said:

When a discretion is abused and made to work an injustice, it is admissible that it shall be controlled by mandamus. See also *Gillinwater v. Railroad Co.*, 13 Ill. 4.

If a discretionary power is exercised with manifest injustice, the courts are not precluded from commanding its duty exercised. They will interfere where it is clearly shown that the discretionary power is abused. Such abuse of discretion will be controlled by mandamus. A public

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officer or inferior tribunal may be guilty of so gross an abuse of discretion or such an evasion of positive duty as to amount to a virtual refusal to perform the duty enjoined, or to act at all in contemplation of law; in such a case mandamus will afford a remedy. *Dental Examiners v. The People ex rel.*, 123 Ill. 241, citing *Tapping on Mandamus*, 66-19; *Wood on Mandamus*, 64; *Com'rs of Poor v. Lynan*, 2 McCord (S. C.), 170; *The People v. Perry*, 13 Barb. 206; *Arberry v. Beavers*, 6 Texas, 457.

The word *may*, or *shall*, when used in the statute, may read interchangeably, as may best express the legislative intention. The rule adopted by this court is, the word *may* means *must*, or *shall*, only in cases where public interests and rights are concerned, and the public or third persons have a claim *de jure*, that the power shall be exercised. *Fowler v. Pirkins*, 77 Ill. 271.

Where the petition clearly shows that the petitioner has a personal interest in the thing he seeks to compel the respondents to do—that he has been injured in his personal interests by the refusal of the defendants to do a duty imposed upon them by law, which is in their power to do or perform, and he has a clear legal right to have the act done, mandamus will lie. *People ex rel. v. Masonic B. Ass'n*, 98 Ill. 637; *North v. Trustees, etc.*, 137 Ill. 296; *High on Extraordinary Remedies*, Sec. 431.

The legislature can not delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. *Locke's Appeal*, 72 Pa. St. 491; quoted with approval in the *Stratton case*, 162 Ill. 494-502.

In construing a new statute, on any subject, it is proper to consider it with reference to the state of the law before its adoption, and the previous legislation on the same subject. *Wright v. People*, 101 Ill. 126; *Wabash, St. L. & P. Ry. Co. v. Binkert*, 106 Ill. 298.

It is a familiar rule that statutes should be so construed that effect may be given to all of their provisions, so that

no part will be inoperative or superfluous. *I. C. R. R. Co. v. City of Chicago*, 138 Ill. 453.

Under section 1 of the act of 1872, the conditions on which territory may be annexed to a village are: A petition in writing therefor, signed by three-fourths of the voters, and the owners of three-fourths (in value) of the property, etc., and that the territory to be annexed shall be contiguous to the village, and not embraced within its limits. When these facts exist, the board may, by ordinance, annex the territory, which ordinance is to be recorded. The legislature has not invested the board of trustees with any discretionary power to determine whether the annexation is expedient or not, but has itself determined in advance, that the existence of the facts stated settles the question of the advisability of the annexation. The village board is authorized to find the facts that the territory is contiguous to the village, and that the petition is signed by the proper number of voters and owners. *Whittaker v. Village of Venice*, 150 Ill. 195-202.

LANE & COOPER, attorneys for appellees.

Where a subordinate body is vested with power to determine a question of fact the duty is judicial, and though it can be compelled by mandamus to determine the fact, it can not be directed to decide it in a particular way, however clearly it be made to appear what the decision ought to be. *County of St. Clair v. The People ex rel.*, 85 Ill. 396; *People ex rel. v. McCormick*, 106 Ill. 184; *People ex rel. v. Dental Examiners*, 110 Ill. 180; *People ex rel. v. Commissioners of Highways*, 118 Ill. 239; *North v. Trustees of the University of Illinois*, 137 Ill. 296; *Hildreth v. Heath*, 1 Ill. App. 82; *People ex rel. v. Commissioners of Highways*, 32 Ill. App. 164; *People ex rel. v. Trustees of Schools*, 42 Ill. App. 60.

The office of the writ of mandamus is, in general, to compel the performance of mere ministerial acts prescribed by law. It lies, however, also to subordinate judicial tribunals, to compel them to act where it is their duty to act, but never to require them to decide in a particular manner. It

is not, like a writ of error or appeal, a remedy for erroneous decisions. *Judges of Oneida Common Pleas v. People*, 18 Wend. 92; *People ex rel. v. Common Council of Troy*, 78 N. Y. 33.

“Where the performance of an act depends upon the previous formation of an opinion as to its necessity, the exercise of discretion must, of course, be involved.” *People v. Commissioners of Highways*, 118 Ill. 245.

The office of the writ of mandamus, when directed to subordinate tribunals exercising judicial or discretionary power, is to compel them to act, where it is their duty to act, but never to compel them to decide in a particular manner. Mandamus will not lie to compel it; and where it is an end which may be attained in different ways, by different means not specifically prescribed by law, it will not lie as to the ways and means, but only as to the end. So when the duty enjoined is simply to act or decide upon a particular case arising, it will lie to compel action or decision, but not its character or effect, how they shall act, or what they shall do, their decision being discretionary; and where the duty claimed arises only upon a condition of fact to be found, and no other person, officer or tribunal is designated to find it, the authority to determine the question of its existence rests with the one charged with the duty so conditioned, and until the condition is so found, the duty prescribed can not be compelled. * * * *People v. Commissioners of Highways*, 32 Ill. App. 164.

Without a clear expression on their part, it is not to be presumed that the legislature intended to make it imperative. We find in the statute no such expression, and are of the opinion they have not so made it. Mandamus, therefore, will not lie to compel its performance. *St. Clair County v. The People*, 85 Ill. 396.

A subordinate body can be required to act, but not how to act, in a matter as to which it has the right to exercise its judgment. The trustees, being vested with the power to determine whether the sureties on a treasurer's bond are sufficient, will not, by mandamus, be compelled to decide

that they are. See cases cited. *People v. Trustees of Schools*, 42 Ill. App. 60; *People v. Davis*, 93 Ill. 134.

MR. JUSTICE WRIGHT delivered the opinion of the court.

Appellants filed their petition for a peremptory writ of mandamus to require appellees, as members of the board of trustees of the village of Donnellson, to pass an ordinance to disconnect certain described territory from the boundary of the village. Appellees answered the petition, claiming the powers conferred upon them by the statute as a board of trustees of such village in respect to the disconnection of territory was discretionary, and they as such board having, upon proper application to them, refused to disconnect such territory, were not subject to control by judicial proceedings, and denied the petitioners' right to the writ of mandamus. A demurrer was interposed to the answer, which was by the court overruled, whereupon, appellants abiding by their demurrer, final judgment was given against appellants refusing the mandamus and for costs, from which they have appealed to this court, and have assigned such action of the court for error, by which they seek a reversal of such judgment.

It was held in *City of Galesburg v. Hawkinson*, 75 Ill. 152, that an act of the legislature, so far as it attempts to confer power upon the courts to change the boundaries of municipal bodies by annexing or disconnecting territory, is unconstitutional, such acts being in their nature legislative, and not judicial acts; the power can not be either legislative or judicial, as the legislature may be disposed to retain it, or surrender it to the judiciary. If the boundaries of municipal corporations can be altered or changed by the legislature at discretion, and the authorities are to that effect, then the courts can not be invested with such power, as it is legislative power.

In *Whittaker v. Village of Venice*, 150 Ill. 196, it was sought by the common law writ of certiorari to review the proceedings of the village board by which certain territory had been annexed to the village and its boundaries thereby

C. & A. R. R. Co. v. Harbor.

enlarged, and it was there held that the action of the trustees in passing the ordinance of annexation was legislative in its character; whether the boundaries of a city or village should be enlarged or contracted is not a question of law or fact for judicial determination, but purely a question of policy to be determined by the legislative department.

From the authorities we have cited, it conclusively follows that the acts of the board of trustees sought to be coerced by the proceedings herein, are of a legislative character, the performance of which is exclusively within its province to decide. Had the board refused to act no doubt mandamus would lie to compel action, but in no event could the nature of its decision be controlled. Having decided against disconnecting the territory in question, no power or necessity existed for the interposition of the court, and its judgment will be affirmed.

Judgment affirmed.

80	607
180s	394

Chicago & Alton Railroad Co. v. Elisha Y. Harbor.

1. VERDICTS—*Where the Declaration Contains One Good Count.*—If the declaration contains one good count, it will be sufficient to sustain a verdict, even though all the other counts are defective.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

PATTON, HAMILTON & PATTON, attorneys for appellant.

In pleading upon statutes, when there is an exception in the enacting clause, the plaintiff must show that the defendant is not within the exception. Otherwise, the declaration will be bad after verdict. *C., B. & Q. v. Carter*, 20 Ill. 390;

G. W. R. R. v. Hanks, 36 Ill. 251; T., P. & W. v. Lavery, 71 Ill. 522; Knick. Ins. Co. v. Tolman, 80 Ill. 106; Mahler v. Sinsheimer, 20 Ill. App. 401; Abney v. Austin, 6 Ill. App. 49.

CHAPIN & WOODRUFF, attorneys for appellee.

An objection which goes to the sufficiency of the declaration must be tested on demurrer. It is too late after verdict. *Matson v. Swanson*, 131 Ill. 263; *C., B. & Q. v. Harwood*, 90 Ill. 425.

MR. JUSTICE WRIGHT delivered the opinion of the court.

Appellee sued appellant for negligently running or backing its train of cars at a highway crossing, whereby the former was injured while attempting, with due care, to cross such highway with team and wagon. A trial by jury resulted in a verdict and judgment against appellant for \$1,000, from which it prosecutes this appeal.

In support of a reversal of the judgment it is insisted that some of the counts of the declaration are insufficient to support such judgment, and for such reason the motion in arrest of judgment should have prevailed in the trial court. We are of the opinion there were good counts in the declaration free from the objections made, and to which the evidence in the case was applicable, and for this reason the motion in arrest of judgment was properly denied. It is also insisted the verdict is against the evidence, that the court refused proper and gave improper instructions to the jury, and that the damages are excessive.

There was conflict of evidence respecting the negligence of the appellant, and as to the care of appellee at the time of his injury, and in view of the condition of the record in those respects we feel compelled to accept the verdict of the jury as decisive of those questions. Upon the whole, we think the law was fairly stated to the jury, and there was no material error in giving or refusing instructions. Neither do we regard the damages so far excessive as to require a reversal at our hands for that reason. The jury

I. C. R. R. Co. v. Lindgren.

heard the evidence and the trial judge has approved the verdict and we find no sufficient reason for setting it aside.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

Illinois Central Railroad Company v. Lena Lindgren,
Administratrix.

80	609
95	383

1. VERDICTS—*When Not to be Disturbed*.—The verdict of the jury will not be disturbed except when manifestly against the weight of the evidence and where the latter is contradictory.

2. ORDINARY CARE—*Persons in Perilous Positions*.—When in a perilous position, a person is not held to the exercise of the same care and prudence as he will be when in a place of security.

Trespass on the Case.—Death from negligent act. Trial in the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

J. S. WOLFE, attorney for appellant; JOHN G. DRENNAN, district attorney I. C. R. R. Co., of counsel.

To go on a railroad crossing in the way of a train which can be neither seen nor heard, but which would be either visible or audible, except for some temporary hindrance to sight or hearing, is to be negligent.

Where plaintiff went forward into danger, which permanent obstructions made it impossible to see, and which a passing noise made it difficult to hear, the permanence of obstructions to the sight made hearing his best reliance; a few moments' delay would have given him the full benefit of it. He acted with less prudence than the law exacts. Central R. R. Co. of N. J. v. Smalley, 39 Atl. Rep. 695; 4 Neg. Cas. 198.

GERE & PHILBRICK, attorneys for appellee.

The flagman not being visible or not in a position where

he could warn parties approaching of the situation so far as this plaintiff is concerned, was the same as though there was no flagman there. *L. S. & M. So. R. R. Co. v. Johnson*, 135 Ill. 651.

It is the duty of a flagman stationed at a public crossing by a railway company to know and give timely warning of the near approach of trains, and the public have the right to rely upon a reasonable performance of his duty. *C., R. I. & P. Ry. Co. v. Clough*, 134 Ill. 586.

When a company places a flagman at a crossing charged with a duty to display proper signals of warning on the approach of a train, the public may have a right to rely on the absence of a warning and presume the track to be clear. *C., M. & St. P. Ry. Co. v. Wilson*, 133 Ill. 55; *C., R. I. & P. R. R. Co. v. Clough*, 134 Ill. 586.

An engineer, while his locomotive was standing near the crossing, at the instant a person was crossing the track in front of his engine, negligently and maliciously caused the steam to escape, whereby the team was made to run off and the injury inflicted; the company was liable. *T. W. & W. Ry. Co. v. Harmon*, 47 Ill. 293.

Railroads operating their franchise in populous cities, and over and along public thoroughfares, where the hazard of persons and property is great, will be held to the exercise of a degree of caution and skill commensurate with the hazard. *T. W. & W. Ry. Co. v. Harmon*, 47 Ill. 293; *L. S. & M. S. Ry. Co. v. Johnson*, 135 Ill. 651.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This case was before this court at a former term on a writ of error, and is reported as *Lingreen v. I. C. R. R. Co.*, 61 Ill. App. 174, where a former judgment therein, in favor of the I. C. R. R. Co., was reversed and the case remanded for another trial, which resulted in a verdict and judgment against the I. C. R. R. Co. for \$2,541, and it now brings the case to this court by appeal, and urges a reversal of that judgment on the grounds the evidence fails to show that

I. C. R. R. Co. v. Lindgren.

the appellee's intestate was using ordinary care for his safety when he was killed; that the court gave improper and refused proper instructions, and improperly modified proper instructions, requested by appellant.

The evidence showed that Charles Lindgren, appellee's intestate, between four and five o'clock in the afternoon, while attempting with his carriage and horses to cross the tracks of the appellant's railroad at a crossing of one of the principal streets in the city of Champaign, where the trains on appellant's railroad, crossing there, can not be seen on account of buildings, except where they cross this street, was thrown from his carriage on account of the horses becoming frightened at an engine approaching this street crossing. It also shows that the engineer in charge of the engine, seeing the team drawing the carriage was about to cross, stopped to let it pass over. The team, however, seeing and hearing the engine so near to them, became frightened and were attempting to run away; but the driver had nearly succeeded in quieting them, when the engineer started it in motion again, which caused them to become more frightened and they did then run away, turning the carriage over and killing Mr. Lindgren.

It is true that the evidence tends strongly to show that Mr. Lindgren did not himself attempt to prevent the team from running away, leaving the management of them to the driver, who is shown to have been a capable one, but it fully appears that from the time the horses saw and became frightened at the engine until the carriage was overturned, was but a very short time; and it is not unreasonable to suppose that there was more likelihood of the driver controlling the team alone, as he was driving when attempting to cross the railroad, than if he was interfered with in their management by Mr. Lindgren.

The evidence shows that the appellant was required by city ordinance to keep, and had kept a flagman at this crossing, for a number of years; and that this flagman was accustomed to, and usually did, signal persons not to cross this street crossing, when an engine or train was approach-

ing near thereto; and although this flagman was at this crossing when this carriage and team approached, he did not signal for it not to cross; which failure to signal was taken by those in the carriage as meaning that they could safely cross; and as they did not hear or see any engine or train about to cross, they deemed it safe, and attempted to go over, which attempt resulted as hereinbefore stated.

We believe from all the evidence in this record, that the jury were justified in believing therefrom, that Mr. Lindgren was using due care for his safety when he was killed as aforesaid.

As to the ruling of the Circuit Court on the instructions, we are not unmindful that those complained of contain some inaccuracies when read singly, but when all the instructions as given, are read as one charge, as they should be (see *Whitney & Starrette Co. v. O'Rourke*, 172 Ill. 183), they fairly gave the law of this case applicable to the pleadings and the evidence; so that on the whole record we do not believe that the appellant was unduly prejudiced by any of the instructions given, refused, or modified.

As we believe the evidence warranted the verdict, and, on the whole record, the proceedings and result are fairly correct, we affirm the judgment in this case. Judgment affirmed.

Mr. Justice WRIGHT took no part in the consideration or decision of this case in this court, as he presided in the court below at one of the trials of this case in that court.

**M. P. Schenk, Chester Schenk and Caroline Russell v.
Mercy Schenk.**

1. ADMINISTRATORS—*May be Appointed to Preserve an Estate until Probate of Will.*—The County Court may appoint any person as administrator to collect and preserve an estate of a decedent until the probate of his will or administration of his estate is granted, whenever any contingency happens that is productive of great delay before letters testamentary or of administration can be issued.

Schenk v. Schenk.

Administration of Estates.—Trial in the Circuit Court of Fulton County, on appeal from the County Court; the Hon. JOHN A. GRAY, Judge, presiding. Finding for petitioner; appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

W. SCOTT EDWARDS, attorney for appellants.

During any contest in relation to the probate of any will before the same is recorded, or during any contest over the right of executorship, or to administer the estate of any person dying testate or intestate, or when any contingency happens which is productive of great delay before letters can be issued, the County Court may appoint any person or persons administrator to collect, etc. Sec. 11, Adm'r Act, Hurd's S. 1897.

It does not contemplate or provide for any petition, and outside of what is contained in the petition filed in this case, which was not offered in evidence, there is not one word of evidence that brings this case within the law above cited. No evidence that there is a contest over any will, or over the right to administer, or to bring the case within any of the provisions of any part of that section of the statute.

CHIPERFIELD, GRANT & CHIPERFIELD and LAWRENCE W. JAMES and J. D. BRECKENRIDGE, attorneys for appellee.

PER CURIAM.

Appellee, widow of John Schenk, deceased, filed her petition in the County Court of Fulton County, setting up that her husband died March 26, 1898, leaving a will and a large amount of real and personal property; that the will was admitted to probate May 3, 1898; that Chester Schenk, the executor named in the will had prosecuted an appeal from the order admitting the will to probate, which was still pending; that her award had not been set out to her and that assets of the estate were in danger of being lost pending the appeal and praying that an administrator be appointed to collect. The County Court appointed W. C. Worley, administrator to collect, and appellants appealed to the Cir-

cuit Court. Upon a hearing in the Circuit Court, the order of the County Court was affirmed and judgment rendered against appellants for costs.

The action of the court below is fully supported by section 11, chapter 3, of the Revised Statutes, entitled "Administration of estates," which reads:

"During any contest in relation to the probate of any will, testament or codicil, before the same is recorded, or until a will which may have once existed, but is destroyed or canceled, is established and the substance thereof committed to record with proof thereupon taken, or during any contest in regard to the right of executorship, or to administer the estate of any person dying testate or intestate, or whenever any other contingency happens that is productive of great delay before letters testamentary or of administration can be issued upon the estate of such testator or intestate to the person or persons having the legal preference to the same, the County Court may appoint any person or persons as administrators to collect and preserve the estate of such decedent until probate of his will, or until administration of his estate to be granted, taking bond," etc. Schenk et al. v. Schenk, 2.

Complaint is made because the court rendered judgment against appellants for costs. So far as the costs of entering the order of appointment of Worley in the County Court is concerned, that should be paid out of the assets of the estate; but all other costs were occasioned by the resistance of appellants and should be paid by them. We are not disposed to reverse the judgment because the court included in its order for payment of costs the small fee due the county clerk for entering the order of appointment. Order affirmed.

M. P. Schenk et al. v. Mercy Schenk.

1. APPEALS—*From an Order of the County Court Admitting a Will to Probate—Must be to the Circuit Court.*—An appeal from the order of the County Court admitting a will to probate is not a suit or proceeding at law or in chancery, within the meaning of section 8 of the Appellate Court act. The appeal is, therefore, properly taken to the Circuit Court of the county.

80	614
80	614
80	614
95	209
80	614
198	1828

Schenk v. Schenk.

Probate Proceedings.—Trial in the Circuit Court of Fulton County, on appeal from the County Court of said County; the Hon. JOHN A. GRAY, Judge, presiding. Appeal dismissed for want of jurisdiction. Heard in this court at the November term, 1898. Reversed and remanded. Opinion filed February 7, 1899.

W. SCOTT EDWARDS and H. W. MASTERS, attorneys for appellants.

Section 8, Chap. 37, R. S., the Appellate Court act, is a general statute creating these Appellate Courts and regulating the practice therein and defining the jurisdiction thereof. It became in force July 1, 1877, and was amended in 1887. Section 14, of Chap. 148, the statute of Wills, went into force July 1, 1872. It is a special statute. S. & C. Stat., Chap. 148.

There is no repugnancy in the two sections. The Appellate Court act regulates appeals from final judgments, orders or decrees in any suit or proceeding at law or in chancery, etc., while section 14 of the statute of wills regulates an appeal from an order of the County Court and Probate Court, allowing or disallowing any will to probate, which is not a proceeding at law. It is not *inter partes*, but *in rem*. It is informal without written pleadings; it is of a summary character and there are no hostile parties; there is no jury and no contest.

A suit or proceeding at law, as those terms are used in section 8 of the Appellate Court act, as amended, must be understood to mean a suit or proceeding instituted and carried on in substantial conformity with the forms and modes prescribed by the common law (Grier v. Cable, 159 Ill. 29-36); and that proceedings for the probate of a will in the County Court do not come within that definition.

This case is not a suit or proceeding at law or in chancery, within the meaning of the Appellate Court act, and the appeal was properly taken to the Circuit Court from the County Court. The repeal of a statute by implication is not favored. Bruce v. Schuyler, 4 Gil. 221; Ottawa v. La Salle Co., 12 Ill. 339; McDonough Co. Sup. v. Campell, 42 Ill. 490; Hume v. Gossett, 43 Ill. 297; Cole v. Van Riper,

44 Ill. 58; Harding v. R. R. & St. L. Co., 65 Ill. 90; Wragg v. Penn. Tp., 94 Ill. 11; Holton v. Daly, 106 Ill. 131; Hyde Park v. Oakwoods Cemetery Ass'n, 119 Ill. 141.

JAMES & BRECKENRIDGE, attorneys for appellee, contended that while the widow may not be, in legal sense, strictly a creditor, she is a preferred claimant, made so by "law," with a status fixed and defined too immovably to be changed or altered at the behest of either avarice or ill-will. Strawn v. Strawn, 53 Ill. 263; Phelps v. Phelps, 72 Ill. 545; Miller v. Miller, 82 Ill. 463; York v. York, 38 Ill. 522.

MR. JUSTICE WRIGHT delivered the opinion of the court.

This was an appeal to the Circuit Court from an order of the County Court allowing the will of John Schenk to probate. The Circuit Court sustained the motion of appellee to dismiss the appeal, and dismissed the same for want of jurisdiction, from which order appellants prosecute this appeal.

The only question presented by the record for our decision is, whether an appeal from the order of the County Court, admitting a will to probate, is given by law to the Circuit Court, or whether the appeal lies directly to this court.

Section 14 of the statute in regard to wills provides:

"Appeals may be taken from the order of the County Court, allowing or disallowing any will to probate, to the Circuit Court of the same county, by any person interested in such will, in the same time and manner as appeals may be taken from justices of the peace, except the appeal bond and security may be approved by the clerk of the County Court; and the trials of such appeals shall be *de novo*."

It is contended by appellee that this section is superseded, or repealed by implication, by section 8 of the Appellate Court act. No direct decision of the Supreme Court or any of the Appellate Courts have been cited to sustain this point, and so far as we are advised no such decisions exist. It is insisted, however, by counsel for appellee, that the reasoning of the Supreme Court contained in the case of Union Trust Co. v. Trumbull, 137 Ill. 146, and Lee v. People,

Schenk v. Schenk.

140 Ill. 536, and other like cases, by which the court reached the conclusion that section 8 of the Appellate Court act as amended in 1887, had the effect, by implication, of repealing section 122 of the County Court act, should with like force and effect be applied to section 14 of the statute in regard to wills. We are not, however, disposed to apply the doctrine of those cases further than the Supreme Court itself has extended it, and have reached the conclusion that the reasoning of the Supreme Court, contained in the later case of *Grier v. Cable*, 159 Ill. 29, has the greater analogy to the question here presented. In the latter case it was held that the presentation and allowance of claims against the estates of decedents are in no proper sense suits or proceedings at law or in chancery, but purely statutory proceedings, provided for the prompt and summary presentation, allowance and classification of all just claims against such estates. While the probate of a will may be of ancient jurisdiction in certain courts, the same may also be said of claims against the estates of decedents, the jurisdiction thereof being still retained, under our constitution, by the common law courts. *Darling v. McDonald*, 101 Ill. 370. Still it can not be justly said that the jurisdiction conferred by the statute in regard to wills is in any proper sense a suit or proceeding at law or in chancery, but is purely and merely a statutory proceeding provided for the prompt and summary method of probating and giving effect to wills in testate estates.

Our conclusion then is, that this is not a suit or proceeding at law or in chancery, within the meaning of section 8 of the Appellate Court act, and that the appeal, therefore, was properly taken from the County Court to the Circuit Court, and for the error in dismissing such appeal the judgment of the Circuit Court will be reversed and the cause remanded.

**B. F. Cutler v. Paul Sours, Mrs. J. U. Cottingham and
Mary S. Spriggs.**

1. **ROADS AND BRIDGES—Power of the Supervisors to Revoke Proceedings.**—Where, in the course of proceedings to lay out a highway, an appeal is taken to three supervisors, such supervisors have all the authority given by the statute to the commissioners of highways; and if, after making an order laying out the highway as petitioned for, and after proceeding to ascertain the total damages for the same, they are of the opinion that such damages are manifestly excessive and that the payment thereof will be an unreasonable burden upon the taxpayers of the township, they have power to and may lawfully revoke all the proceedings had by them upon such petition.

Certiorari, to quash proceedings of supervisors in highway matters. Trial in the Circuit Court of Coles County; the Hon. FRANK K. DUNN, Judge, presiding. Judgment for petitioner; appeal by respondents. Heard in this court at the November term, 1898. Reversed and remanded with directions.

ANDREWS & VAUSE, attorneys for appellant.

The return made by the inferior tribunal should contain a complete history of the proceedings in itself, and should not merely adopt as true, statements in the petition or affidavit for the writ. *Star Glass Co. v. Longley*, 64 Ga. 576; *Mann v. Swift*, 3 Cow. (N. Y.), 61.

Commissioners and supervisors on appeal have power to revoke after damages are assessed. Revised Statutes (S. & C.), Chap. 121, Sec. 48; *Smith v. Com. of Highways*, 150 Ill. 393; *People v. Com. of Highways*, 103 Ill. 640-645; *People v. Com. of Highways*, 88 Ill. 141.

The appeal taken by Williams and Cunningham to the County Court was a valid appeal. *Revette v. Race*, 152 Ill. 672; *Chronic v. Pugh*, 136 Ill. 539-544; *Town of Partidge v. Snyder*, 78 Ill. 519.

The County Court has jurisdiction of appeals from judgments of justices of the peace. A distinction must be made between error in the exercise of jurisdiction and lack of jurisdiction of the subject-matter. *Wenner v. Thornton*, 98 Ill. 165.

While section 59 of chapter 121 (S. & C. Statutes) confers the same power on the supervisors as the commissioners, it does not limit its exercise to the manner prescribed in previous sections as to its exercise by the highway commissioners. *Board of Supervisors v. Magoon*, 109 Ill. 150.

JAMES W. & EDWARD C. CRAIG, attorneys for appellees, contended that the statute applies to no cases except where a jury has been waived, and to no other class of cases. Under no circumstances, in this sort of a case before the court now, could a jury have been waived, because there are no questions of fact that could have been submitted to the determination of a jury. This exact question has been decided in the case of *Wackerle v. The People*, 168 Ill. 250; *Martin v. Martin*, 170 Ill. 18.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was a common law writ of certiorari in the Circuit Court of Coles County, issued on the petition of the appellees against the appellant and two others, supervisors of Coles county, requiring them to send up the record of a certain proceeding in regard to the laying out of a highway in the town of Lafayette, in that county, and asking the court to quash the order of those supervisors, made on March 28, 1898, in the proceedings regarding the said highway.

The petition for the writ of certiorari alleges that a valid petition for a new highway, describing it, was presented to the commissioners of highways of that town, and the same was denied by the commissioners; an appeal was regularly taken from their decision to the three supervisors, and by them the decision of the commissioners denying the petition was reversed, and the petition for the highway allowed, after which the supervisors proceeded to ascertain the damages to the three land owners over whose land the proposed highway passed.

The supervisors agreed with one of the land owners to take \$120 as his damages for the highway passing over his

land, and, being unable to agree with the other two, caused their damages to be assessed by a jury before a justice of the peace, on September 19, 1897, where one was allowed \$112.40, and the other \$169 damages, which made the total amount of damages for the highway, as thus ascertained, \$401.40.

On September 23, 1897, the supervisors made, and filed with the town clerk of the town of Lafayette, their order in regular form, laying out the highway as petitioned for, with a plat and survey of the same attached.

On September 29, 1897, the two land owners whose damages had been assessed before the justice perfected an appeal to the County Court of Coles County, from such assessment; and at the March term, 1898, of that court, on the trial of their cases thus appealed, their damages were assessed, one at \$270 and the other \$730.

On March 28, 1898, it being within ten days after the County Court had entered the judgments aforesaid, two of the supervisors (the other having been given notice) met in pursuance of notice given to all the parties in interest, and made an order in this petition for a road proceeding in which they recited in full all of the foregoing facts, and all the proceedings concerning the petition for a road, and then stated that they "being of the opinion that the damages finally assessed by the jury at the March term of the County Court of Coles County, in the within case, are manifestly too high, and the payment of the same would be an unreasonable burden upon the taxpayers of the town of Lafayette, do hereby revoke all the proceedings had upon within petition, this 28th day of March, A. D. 1898." Which order was, on the day it was made, filed in the office of the said town clerk, and by him entered in his highway record.

The petition for the writ of certiorari had attached to it, and made a part thereof, a copy of all the proceedings and files in the highway in question, certified to by said town clerk, as being correct, and the petition asked that a writ of certiorari issue, requiring the three supervisors, whom it

made defendants, to cause the record of the orders and proceedings on this road petition to be certified to the court, and prayed, upon a hearing, the court would quash the order of the supervisors made upon this petition for a road on March 28, 1898, as the same was void for want of jurisdiction in the supervisors to make it, after they had made the valid order of September 23, 1897, declaring it a highway.

The supervisors, having been served with the writ, made return thereto, in which they stated that the certified copy of the orders, proceedings, and files made in the petition for the road in question, as contained in the petition for the writ, was true and correct.

The supervisors then moved the court to quash the writ of certiorari, which was denied, and on motion of the petitioners the court quashed the order of the supervisors made March 28, 1898, as prayed in the petition for the writ.

The appellant, having perfected an appeal to this court from this judgment, brings the case here and urges us to reverse the same, on the ground that the court improperly denied the motion of the supervisors to quash the writ, and improperly quashed the order of the supervisors made March 28, 1898.

The principal contention of the appellees in this court is that under the provisions of our road and bridge act, when the supervisors, on September 23, 1897, after they had ascertained the aggregate amount of damages to be \$401.40, that the owners of the land over which the road was to pass were entitled to, by agreement with one, and assessment of damages by jury, before a justice, as to the other two, made their order in proper form, laying out the road as a highway, and on the same day filed it, together with a survey and plat of the road, with the town clerk of the town of Lafayette, they were without power or jurisdiction afterward to make the order they did on March 28, 1898, revoking their former proceedings on this petition for the road.

The appellant contends that inasmuch as the two land owners properly appealed to the County Court from the

assessment of their damages before the justice, and such appeals were not determined until within ten days before March 28, 1898, then, and not until then, was it finally ascertained that the total damages for the road was \$1,220; and as the supervisors were then of the opinion that such damages as were thus finally ascertained were manifestly excessive, and the payment of that amount would be an unreasonable burden upon the taxpayers of the town of Lafayette, under Sections 39, 47 and 48, of Chapter 121, S. and C. Ill. Statutes, 1896, they then had the power and jurisdiction to make the order of revocation that they did.

We are of the opinion that the three supervisors to whom the appeal from the decision of the commissioners of highways denying this road petition was taken, had all the authority given by our road and bridge act to the commissioners in regard to this road petition. (See Sec. 60, S. and C. Ill. Statutes, 1896, p. 3578. And under Sec. 39, Ibid., p. 3563, they were required, before they ordered the road to be established, to ascertain, as in that act thereafter provided, the aggregate amount of damages the owners of the land over which the road passed would be entitled to; provided that, in case an appeal was taken from the assessment of damages before the justice of the peace, they might, in their discretion, make an order laying out the road, either before or after such appeal was determined, in the manner in the said act thereafter provided; that is, first, the supervisors had to ascertain the total amount of damages to be paid to the land owners (mentioned in the section) before they could order the road to be established; second, these damages they must ascertain in the manner provided in that act; and third, they might, in their discretion, in the manner provided in that act, make an order laying out such road before or after the determination of an appeal. in case an appeal is taken from the assessment of such damages, before the justice of the peace.

By section 40 of this act the supervisors were directed to ascertain such damages, if they could, by agreement with such land owners as were competent to contract; or, if such

damages could not be ascertained by agreement, then by sections 41, 42, 43, 44, 45 and 46 of this act, they could ascertain them by procuring an assessment thereof by jury before a justice of the peace, where the trial must be conducted as in other civil cases, and the verdict of the jury assessing such damages must be returned to the justice and entered upon his docket in the nature of a judgment.

By section 47 of this act, the supervisors must, within ten days after the total amount of such damages were thus ascertained, either by agreement with the parties or by assessment before a justice of the peace and jury, as above stated, hold a meeting to finally determine upon the laying out of the road; and by section 48 of this act, when such damages were not wholly agreed upon, and the supervisors were of the opinion that the damages assessed by the jury were manifestly too high, and the payment of the same would be an unreasonable burden upon the taxpayers of the town, they might revoke all proceedings had upon the petition for the road, by a written order to that effect, which annulled all the proceedings had upon the petition for the road.

It seems to us that it is clear, from the provisions of said sections of this act referred to by us, that it was intended by the legislature to thereby give the supervisors (whose decisions in such matters are made, by section 61 of the act, final,) full power and discretion to revoke and annul all the prior proceedings and orders made on a road petition, whenever it is necessary to ascertain the aggregate amount of damages that should be paid to the land owners over whose land the proposed road passed, by assessing the same by jury, and the verdict fixes such damages at a sum so large that in the judgment of the supervisors it is manifestly too high, and the payment thereof would be an unreasonable burden upon the taxpayers of the town. But if this wholesome power and discretion are given the supervisors to be exercised only when such a wrongful result is reached in the assessment of such damages by the jury in the justice court, but ceases when the same result is reached on the final

assessment of such damages in the same case, on an appeal, in another court, then, indeed, is the power given short in the final accomplishment of the very wholesome result intended.

We are satisfied that by a fair construction of these sections of our statute the power to revoke for the cause named in the statute continues in the supervisors until the damages are finally ascertained by the verdict of a jury on an appeal, if an appeal is taken from the assessment thereof by the jury before a justice.

The further contention of the appellees is, that under the provisions of our road and bridge act, these two land owners had no right to prosecute appeals, in their cases, from the judgments entered on the verdicts of the jury in the justice's court, to the County Court, as they did, but by the provisions of said act, their damages, as assessed by the jury in the justice's court, was final; and as all the damages occasioned by laying out this road, were, in fact, ascertained as provided by said act when, on September 23, 1897, the supervisors made their order establishing the road in question as a highway, they could not afterward annul the proceedings on this road petition, as was attempted by them in their order made March 28, 1898.

But to so hold would be, we think, to ignore the proviso of said section 39, when it says that "*in case an appeal is taken from the assessment of damages before the justice of the peace, the commissioners (or supervisors, if on appeal before them) may, in their discretion, make an order laying out, widening, altering, or vacating such road, either before or after such appeal is determined, in the manner hereinafter provided.*" (The italics are ours.) The manner thereafter in the act provided being by the revocation of the proceedings on the road petition as set forth in section 48, or by final confirmation thereof, as provided in section 49.

Besides, in the case of *Ravette v. Race*, 152 Ill. 672, Mr. Justice Magruder, at page 678 of the opinion, says: "By section 46, the verdict of the jury is returned to the justice and entered by him on his docket in the nature of a judgment. The appeal from this judgment must be to a higher

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court, in the same way as an appeal from any other justice's judgment is taken."

As we are of the opinion that the supervisors had jurisdiction to make the order they did on March 28, 1898, we think the Circuit Court committed reversible error when it denied the motion of the supervisors, as defendants to the petition for the writ, to quash the writ, and therefore we reverse the judgment of that court and remand the case to it, with instructions to quash the writ and dismiss the petition on the motion made by the supervisors, with costs to the petitioners.

Reversed and remanded, with directions to quash the writ and dismiss the petition at costs of petitioners.

Lake Erie & W. R. R. Co. v. Ludvig Ericson.

1. FIRES ESCAPING FROM LOCOMOTIVES—*Prima Facie Case*.—Proof of the destruction of property, by fire escaping from a locomotive, raises a *prima facie* case of negligence, which the defendant may rebut by showing the absence of negligence, or that the plaintiff's own fault or negligence contributed to the injury.

Trespass on the Case, for negligently spreading fire. Trial in the Circuit Court of Ford County; the Hon. JOHN H. MOFFERT, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

CLOUD & KERR, attorneys for appellant.

It is error to instruct the jury that evidence of the setting of a fire by sparks escaping from a locomotive engine "makes a *prima facie* case of negligence" against the railroad company. 3 Starr & Curtis' Ann. Stat., 3294, Par. 123; T., W. & W. R. Co. v. Larmon, 67 Ill. 68, 71; C. & E. I. R. Co. v. Goyette, 133 Id. 21.

SCHNEIDER & CLEMENTS, attorneys for appellee.

When there is evidence presented to rebut *prima facie* case, and this evidence is insufficient, the jury are sole

judges of whether that insufficiency is to be attributed to the character of the machinery or the competency of the servants. L. E. & St. L. R. R. Co. v. Spencer, 149 Ill. 104.

Failure to prove that fireman was careful at the particular time in question after a *prima facie* case is established leaves a presumption that appellant was negligent. C. & A. R. R. Co. v. Quaintance, 58 Ill. 398.

MR. JUSTICE WRIGHT delivered the opinion of the court. Appellee brought a suit in case against appellant for negligently spreading fire upon his premises, causing the destruction of hay and grass, for which he recovered a verdict and judgment for \$30, to reverse which appellant appeals to this court, and for cause for such reversal insists the verdict is against the weight of the evidence and the court gave improper instructions to the jury.

It is first argued against the verdict that the evidence fails to prove that appellant communicated the fire to the premises of appellee. An examination of the evidence discloses that appellee's farm is north of the track of the railroad, and that on the 17th February, 1898, the day of the fire, there was a strong south wind, and directly after the passing of a passenger and a freight train, they being about a mile apart, the fire on appellee's premises was discovered. After the fire a small coal cinder was found at the place where the fire appeared to have started. From these facts and other circumstances in proof, we think the jury were warranted in finding that the fire was communicated from one of appellant's engines, and in the absence of proof in the record that there existed other sources from which the fire could have spread, the inference was conclusive that the fire did escape from one of the engines. It being established by the evidence, as we think it clearly was, that the fire was communicated from the locomotive engine of appellant the provisions of the statute in such cases become operative, by which it is declared that such fact shall be taken as full *prima facie* evidence to charge with negligence the corporation who shall at the time of such injury by fire be in use and occupation of such railroad, and also those who

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shall at the time have the care and management of such engine. The burden was therefore cast upon appellant to rebut by evidence legally sufficient for such purpose, the legal presumption of negligence created by the statute. This it endeavored to do by showing that its engines were equipped with approved modern appliances in general use for arresting sparks; that they were in good repair and condition and skillfully operated by competent servants. The jury heard and considered all the evidence and decided against appellant's contention. A strong circumstance in the case upon this point is, that a coal cinder about the size of the end of a lead pencil, and a quarter of an inch long, was found at the place where the fire ignited. This fact, in view of all the evidence in the case, we think justified the jury in finding that reasonable care had been omitted in providing the equipment of the engine, either in its original construction or examination and repair afterward, or in its operation.

While the instructions to the jury, of which counsel complain, may not be wholly free from the objections made to them, we do not think any harmful error has occurred in this respect. When all the instructions are considered together, those given at the instance of appellant, as well as those on the part of appellee, it appears the law was fairly given to the jury as favorably as the rights of appellant could demand, so far as applicable to the evidence and the issues being tried.

Finding no reversible error in the record and proceedings of the Circuit Court, its judgment will be affirmed.

City of Arcola v. Kate Eckert and Eliza Eckert.

1. VERDICTS—*On Conflicting Evidence.*—Where the testimony is conflicting it is the peculiar province of the jury to determine where the truth lies.

Trespass on the Case, for damages caused by raising the grade of a street. Trial in the Circuit Court of Douglas County; the Hon. WILL-

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IAM G. COCHRAN, Judge, presiding. Verdict and judgment for plaintiff: appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

E. L. WALKER and BENJ. W. GERE, attorneys for appellant.

HORACE S. CLARK and JOHN F. SCOTT, attorneys for appellees.

MR. JUSTICE HARKER delivered the opinion of the court.

This is an appeal from a judgment of \$400, recovered by appellees for damages to their residence lot, caused by appellant raising the grade of a street in front of it, whereby surface water was cast upon it and the way of egress and ingress between it and the street impaired.

A reversal is urged because the court erred in instructing the jury, and because the damages are excessive.

The evidence shows that, in making certain street improvements, dirt was hauled and dumped upon Locust street, in front of appellees' property, so that the grade of the street was raised from one to two feet above the entire frontage of the lot. There is sufficient evidence in the record to support a finding that this improvement impaired appellees' way of egress and ingress and that it increased the dangers of damage to the property from surface water. As is usual in cases of this character, there was great difference in the opinions of the various witnesses as to whether the value of the property was impaired or enhanced by the improvement, and upon the matter of damages. In the conflict, it was the peculiar province of the jury to determine. This court will not disturb their finding in that regard unless it is apparent that they were actuated by prejudice or acted from mere caprice, and that does not appear from the record. The testimony of several witnesses fixed the damages much higher than that awarded.

We are unable to see any serious objection to any of the instructions given for appellees. Complaint is made of the refusal of a certain instruction offered by appellant, and the

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modification of another. While the refused instruction contained a correct proposition of law, appellant was not prejudiced by the action of the court in refusing it for the reason that the jury were fully instructed as to that proposition in other instructions. There was no error in modifying appellant's tenth instruction. Judgment affirmed.

I. Rynders, Henry Higgins and Joseph R. Askew v. Coxie Brothers & Co.

1. PLEADINGS—*Commencement in Debt*.—A declaration properly describes an action of debt where, in the commencement, it is said, "the plaintiffs complain of the defendants of a plea that they render to the plaintiffs the sum of \$300, which they owe and unjustly detain from the plaintiffs."

Debt, on an appeal bond. Trial in the County Court of Morgan County; the Hon. CHARLES A. BARNES, Judge, presiding. Judgment for plaintiffs on demurrer; appeal by defendants. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

T. F. SMITH and E. H. ASKEW, attorneys for appellants.

J. J. REEVE and MORRISON & WORTHINTON, attorneys for appellees.

MR. JUSTICE WRIGHT delivered the opinion of the court. Appellees sued appellants in an action of debt upon an appeal bond, in the usual form in the Circuit Court from a justice of the peace. The declaration is in the ordinary form of such pleading. Appellants demurred to the declaration, which demurrer was by the court overruled, and appellants abiding by their demurrer, the court gave judgment for \$300 debt, the penalty of the bond, to be satisfied on payment of \$181.99, the damages assessed by the court, and also for costs. From this judgment appellants prosecute this appeal, and insist the court erred in overruling the

demurrer to the declaration because, as claimed by counsel, the declaration is uncertain, in that it states the facts by way of recital and without positive averment, and also because the declaration does not conform to the summons in describing an action of debt.

We think counsel misapprehends the declaration in respect to the points made against it. When properly examined, its averments of fact are positive and direct. It states in positive terms that appellant made, executed and delivered the bond described in the declaration, and avers also, by way of describing the bond, that it contains certain recitals, specifying them, and then avers the condition of the writing obligatory, assigning the breach thereof. We are also of the opinion the declaration properly and accurately describes an action of debt where, in the commencement of the pleading, it is said the plaintiffs complain of the defendants "of a plea that they render to the plaintiffs the sum of \$300 which they owe and unjustly detain from the plaintiffs."

We are of the opinion the declaration was sufficient, and the demurrer thereto was properly overruled.

The judgment of the County Court will be affirmed.

80	630
86	461

George Retzer v. Rosa Gourley.

1. APPELLATE COURT PRACTICE—*Exceptions Must Be Preserved*.—An appellate tribunal can not inquire into the sufficiency of the evidence to support a judgment, unless there is an exception to the finding and judgment when the trial is by the judge without a jury, or a motion for a new trial and exception to the overruling of the same when the trial is by jury.

Action for Slander.—Trial in the Circuit Court of Calhoun County; the Hon. THOMAS N. MEHAN, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

GREATHOUSE & SELBY, attorneys for appellant.

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F. A. WHITESIDE, attorney for appellee.

MR. JUSTICE WRIGHT delivered the opinion of the court.

Appellee sued appellant in an action on the case for slander. A trial by jury resulted in a verdict and judgment against appellant for \$1,000, from which he has appealed to this court and assigned errors upon the record by which he seeks a reversal of such judgment. The errors assigned and argued are that the verdict is against the evidence, the court admitted improper evidence, and gave improper and refused proper instructions to the jury.

The condition of the record in this court is such that we are, by the well established rule of practice, forbidden to consider any of the errors urged upon our attention. No motion for a new trial is contained in the bill of exceptions. The rule is settled in this State that an appellate tribunal can not inquire into the sufficiency of the evidence to support a judgment, unless there is an exception to the finding and judgment when tried by the judge without a jury, or a motion for a new trial and exception to the overruling of the same when a trial is had by jury. *I. C. R. R. Co. v. O'Keefe*, 154 Ill. 508, and cases cited. It follows, therefore, that we can not inquire into the alleged error that the verdict is not supported by the evidence. For the same reason we are prohibited from inquiring into the question whether the court erred in the rejection or admission of evidence. It was only ground for a new trial if erroneous, and should have been so urged, and on overruling the motion for a new trial, it should have been preserved in the bill of exceptions before error could be assigned on that decision of the court. *Nason v. Letz*, 73 Ill. 371, and cases cited. None of the instructions, given or refused, are contained in the bill of exceptions, and neither argument nor authority is needed to prove we can not consider the errors assigned upon them in this court. The judgment of the Circuit Court will be affirmed.

NO	632
180	197
80	632
94	48

The Decatur Cereal Mill Co. v. Edward J. Gogerty.

1. **VICE-PRINCIPAL**—*Defined, etc.*—*When He Acts in Excess of His Authority.*—A vice-principal is one to whom is deputed the discharge of some duty or the exercise of some power which belongs to the master, as such. But he does not act as a vice-principal when engaged in any work which does not pertain to the duty or peculiar power of the master, just as an agent does not act as an agent when doing some act entirely outside of his agency.

2. **NEGLIGENCE**—*Defects in Appliances*—*Car Puller.*—It is negligence on the part of a mill-owner to furnish a rope of different sizes, knotted together with loose ends, for use upon the drum of a car puller.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

JOHNS & HOUSUM, attorneys for appellant.

A conductor of a freight train who voluntarily, even with the acquiescence of his employer, undertakes to uncouple cars by going between them while moving, when the same act could have been performed when cars were stopped or from the platform, can not recover for an injury. *Memphis & C. R. Co. v. Graham* (Ala.), 10 So. Rep. 283.

Where plaintiff was told to repair a dump-car in a saw-mill as well as he could temporarily, and, without either authority or direction, went with a piece of lumber to a revolving cross-cut saw to cut the lumber for the car and was there injured by the negligent handling of the lumber, his case should not be allowed to go to a jury. *Lindstrand v. Delta Lumber Co.* (Mich.), 32 N. W. Rep. 427.

Where an employe had entire charge in sinking a shaft, the direction of his fellow-workmen and authority to order repairs, and was injured by defective machinery, he can not recover, as it must be considered he knew, or had means of knowing equal to those of his master, concerning the defects. *Wells v. Coe* (Colo.), 11 Pac. Rep. 50.

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Same principle: *Erskine v. Cheno Val. Beet Sugar Co.*, 71 Fed. Rep. 230; *Texas Cent. R. Co. v. Lyons*, 34 S. W. Rep. 362.

A head sawyer having entire control of a lever that regulated the speed of a saw carriage, while sawing a crooked log, ran the machinery too rapidly and in consequence was injured; held, he could not recover. *Bibby v. Wausau Lumber Co. (Mo.)*, 50 N. W. Rep. 337.

The fact that one servant has power to control and direct the action of another does not render the master liable for his negligence unless the negligent act arises out of and is the direct result of the exercise of the authority conferred upon him by the master over his laborers. *I. C. R. R. Co. v. Swisher*, 61 Ill. App. 613.

If a party voluntarily goes into a known danger while pursuing his duties, not required or forced by the master, and is injured, he can not recover. *Evans v. Chessmond*, 38 Ill. App. 615; *Coal Run Coal Co. v. Jones*, 127 Ill. 379; *Henderson v. Coons*, 31 Ill. App. 77.

An injury that is the natural and probable consequence of acts of negligence is actionable, but an injury that could not have been foreseen, or reasonably anticipated as the probable result of the negligence, is not actionable. *Moley v. Pickle Marble Co.*, 74 Fed. Rep. 155; *Martin v. Cook*, 14 N. Y. Supp. 329.

MILLS BROS. and HUGH CREA, attorneys for appellee.

A servant can not be said to take the risk of working with defective appliances unless he knows, not only the condition of things, but also that danger exists in such condition. *Anderson v. Clark*, 155 Mass. 368.

Where it requires skill and judgment by the servant, not possessed by ordinary observers, to have knowledge of hazards that may be apprehended from the character and condition of the appliances or obstructions, he does not assume these hazards, unless possessed of these requirements. *Davidson v. Cornell et al.*, 132 N. Y. 228.

The fact that a defect in an appliance was open to plaint-

iff's inspection (the flange of an engine wheel deeply worn, and that he knew it was worn), would not necessarily defeat a recovery where it was a matter of skill and judgment which he did not possess to know how much wear and tear it would stand. *Bridges v. St. L., I. M. & S. R. Co.*, 6 Mo. App. 389.

While a servant in the use of appliances is bound to take notice of those dangerous defects of which he has knowledge, and which are obvious to his senses, yet he is not bound to investigate for himself the department of work with which he has nothing to do, and to set up his judgment against that of a master. *Devlin v. W., St. L. & P. Ry. Co.*, 87 Mo. 545.

A prudent man has a right, within reasonable limits, to rely upon the ability and skill of the agent in whose charge the common master has placed him, and is not bound at his peril to set his own judgment against that of his superior. This was said where an employe, at the command of his foreman, left his regular work and operated a cut-off saw, which proved to be dangerous by reason of the rope which controlled the saw being worn and defective. *Indiana Car Co. v. Parker*, 100 Ind. 181; *Atlas Engine Works v. Randall*, 100 Ind. 293.

MR. JUSTICE WRIGHT delivered the opinion of the court.

This was an action by appellee against appellant for negligence in failing to furnish a reasonably safe rope attachment to a car puller in use in appellant's mill, by reason of which, while operating it, appellee was injured and lost an arm. A trial by jury resulted in a verdict and judgment against appellant for \$3,500, from which it appeals to this court. The errors mainly relied upon, in the argument of counsel, by which a reversal of the judgment is sought, are that the verdict is not sustained by the evidence, and the court gave improper and refused proper instructions to the jury.

Appellee's regular employment in the mill of appellant was that of a bookkeeper and clerk. Travis generally tended the car puller and loaded cars out. Turner was general

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superintendent, had control of all the men, and sometimes assisted in loading and unloading cars, and in the operation of the car puller. The car puller is what its name implies, a device used to pull cars by means of a rope attachment hitched to cars and operated by means of a drum or spool, around which the rope winds and unwinds, the power being applied by machinery attached to the engine. The rope used was over a hundred feet in length and about an inch and a half or two inches in diameter. At the time of the accident to appellee the rope in use was of different kinds and sizes tied and knotted together in at least two places, and at the knotted places there were loose ends, without confinement. The knotted portion of the rope was inside the mill, next to the end used around the drum. On August 13, 1897, Turner, the superintendent, desiring to be absent from the mill, requested appellee to take his place, and instructed him to do everything just as he would himself. During the day appellee undertook to operate the car puller, when the knots and loose ends of the rope impeded in some way its operation upon the drum, and involved appellee's arm and injured it, in consequence of which amputation became necessary.

It is first contended that appellee at the time of his injury was for the time being superintendent of appellant, and, therefore, a vice-principal, having full power and authority, and whose duty it was, to inspect all machinery and apparatus and condemn and replace such as was found defective, and for a failure in this respect he could have no right of action for injuries received in the voluntary use of the defective rope. We are not inclined to hold that the evidence proves that appellee was in any proper sense a vice-principal on the day he was injured. No authority is shown by the evidence to have been vested in Turner by the board of directors, to appoint a deputy, and if there was such evidence, it is not apparent that it was the intention of Turner to confer the authority of the master upon appellee to inspect the apparatus or machinery, or give orders and directions concerning its use. All the men for that day were at

the work respectively designed for them, the machinery in operation and the absence of the superintendent was to be but temporary. Appellee, according to instructions from Turner, was to do everything just as he, Turner, would himself do. This, it seems to us, could only refer to such duties as Turner was accustomed to do merely as a fellow-servant. It is not unusual for the same person to be the representative of the master as to certain duties, and a mere servant as to others, and when injured in the latter capacity, by reason of the neglect of the master, his rights are not to be abridged because as to other duties he may have been a vice-principal. A vice-principal is one to whom is deputed the discharge of some duty or the exercise of some power which belongs to the master, as such. And he does not act as a vice-principal when engaged in any work which does not pertain to the duty or peculiar power of the master, just as an agent does not act as an agent when doing some act entirely outside of his agency. *Shear. & Red. Neg.*, 231. So in the operation of the car puller, a business in which Turner sometimes engaged, appellee was not engaged in work in any manner pertaining to the duty or peculiar power of the master.

That it was negligence on the part of appellant to furnish a rope of different sizes, knotted together with loose ends, for use upon the drum of the car puller, seems to us too plain for argument. It therefore remains to determine, as regards the facts in the case, whether at the time appellee received his injury he was in the exercise of ordinary care. He was the bookkeeper and clerk of appellant, and in that capacity it is not to be inferred he had any occasion to use the car puller at any previous time, and therefore his position was such as that he might be permitted to rely upon the ordinary presumption that the master had discharged his duty to the servant in using reasonable care to furnish reasonably safe apparatus for his use. So far as disclosed by the evidence it was the first instance appellee had operated the puller, but from common observation it is reasonable to suppose he understood its mechanism. The

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first and only notice appellee had of the defects in the rope attachment was the incident involving the loss of his arm. We have no hesitancy in saying that from the facts and circumstances in evidence the jury were warranted in finding the appellee was in the exercise of ordinary care at the time of his injury, and we accept the verdict as decisive of this question.

We have considered the points made by counsel for appellant against the instructions of the court given at the instance of appellee, and the modifications of those offered by appellant, and of such as were refused by the court requested by appellant, and we are impelled to the conviction, that in view of the entire series of instructions given by the court, they composed a fair and impartial exposition of the law applicable to the issues, most favorably perhaps to appellant, and in this respect it has no just cause for complaint.

Finding no error in the record and proceedings of the Circuit Court its judgment will be affirmed.

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1. PLEADING—*When the Common Counts Are Sufficient.*—A declaration which contains only the common counts is sufficient in a suit to recover on a contract, where the refusal of the defendant to accept corn, which had been sold and tendered to him in accordance with the contract, is specifically charged as the common ground of recovery.

Assumpsit, on grain contract. Trial in the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Verdict and judgment for plaintiffs; appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

GERE & PHILBRICK, attorneys for appellant.

A party to a contract seeking damages for its non-performance by the other party, must allege and prove that he, the plaintiff, has himself complied with all the condi-

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tions of the contract required of him to be performed, and that the defendant is at fault. *Harber Bros. v. Moffat Cycle Co.*, 151 Ill. 84; *Manistee Lumber Co. v. Union National Bank*, 143 Ill. 490; *Miller v. Wilson*, 37 Ill. App. 399; *Baird v. Evans*, 20 Ill. 30.

J. L. RAY, attorney for appellee.

The work had been done according to contract. Nothing, therefore, remained to be done but to pay for the work done according to the stipulated price, and the contract was, therefore, admissible in evidence under the common counts. *Combs v. Steele*, 80 Ill. 101; *First National Bank v. Hart*, 55 Ill. 67.

MR. JUSTICE HARKER delivered the opinion of the court.

This is an appeal from a judgment of \$190, rendered against appellant in a suit by appellees, to recover for loss sustained by them in the refusal of appellant to accept and pay for three car-loads of corn which had been shipped upon a contract of purchase made by appellant's agent.

Appellant is in the grain and commission business at Kansas City, Mo. Appellees are wholesale dealers in grain at Champaign, Ill. On the 14th of May, 1897, J. F. White, acting for appellant, purchased of appellees three thousand bushels of No. 3 corn, at twenty-five and one-quarter cents per bushel, to be shipped to Cairo, destination beyond. When appellant's confirmation of the purchase was received, some question arose over a requirement that the corn should be subject to Memphis or Nashville inspection, when White agreed that if appellees would ship the corn to Cairo, it should be inspected there; with that understanding the corn was shipped to Cairo, where it was inspected, and the certificates, showing it graded No. 2 and 3, were sent to White and by him to appellant. Appellees then made their invoice and sight draft for the amount of the corn, less one cent per bushel to cover shortage; showed it to White, who said it was satisfactory, attached the draft to the bill of lading and sent it through the Citizens Bank of Champaign

to appellant. When the draft was presented, appellant refused to pay it unless appellees would reduce it \$130, and wired them to that effect. Appellees declined to reduce the draft, and appellant continuing in its refusal to pay, the corn was sold at twenty-one cents per bushel, the market price having declined, and this suit followed to recover the loss.

A reversal of the judgment is urged upon four grounds; first, there could be no recovery on the declaration; second, it was a condition precedent to have the corn inspected by appellees; third, the court erred in admitting conversations between White and appellees; fourth, the court gave erroneous instructions.

It is objected to the declaration that it contains only the common counts, whereas the contract should be declared on specially to support a recovery for its breach. If appellees had performed their part of the contract and nothing remained to be done except for appellant to receive the corn and pay for it (and that is the contention of appellees), the declaration is sufficiently specific. While there is not a special count setting out in full the contract, the manner of the breach, etc., and the declaration is somewhat in the form of the ordinary common counts, it specifically charges, as a ground for recovery, the refusal of appellant to accept corn which had been sold and tendered to it in accordance with the contract of purchase, whereby appellees were compelled to and did sell the corn to others at a loss. The declaration was sufficient to support a recovery on appellee's contention of facts.

The evidence shows the corn was inspected at Cairo by an inspector who usually inspected grain for appellant at that point—Thistlewood—and that it was agreed between appellees and White that Thistlewood should inspect it. But it is insisted that White was not a general agent for appellant and had no authority to agree upon a Cairo inspection. As we view the record, appellant should be bound by any agreement made by White with reference to inspection not inconsistent with its mode of business. Thistlewood had inspected for appellant at Cairo, and for

him to inspect this corn would not be a departure from its custom in that regard. White knew that when he found it necessary to agree to Cairo inspection to have the deal closed, and did so agree, appellant was bound by it.

That view disposes of the alleged error of the court in allowing conversations between White and appellees to go to the jury. So far as this deal was concerned, White was appellant's agent, and all said and done by him with reference thereto was properly heard by the jury.

There was no error in the instructions. Judgment affirmed.

Mr. Justice WRIGHT took no part.

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Prentiss D. Cheney v. Andrew W. Cross.

1. **FORMER ADJUDICATION**—*Judgment on Promissory Note, Conclusive on Parties in Interest, etc.*—Where a note is prosecuted in the name of one at the instance or for the benefit of another person, the adjudication resulting from such prosecution will be conclusive as to such other person, not only as to what was determined in the prosecution, but also as to all other matters involved or which could have been raised and determined in it.

Assumpsit, on a promissory note. Trial in the Circuit Court of Jersey County; the Hon. OWEN P. THOMPSON, Judge, presiding. Finding and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

THOMAS F. FERNS, attorney for appellant.

The \$5,600 D'Arcy note is a pledge, deposited by appellant with the appellee to secure the payment of the \$5,000 note sued on in plaintiff's declaration, and the pledgee is a trustee for the appellant, who is the owner of the pledge.

A pledge is a bailment of personal property as security for some debt or engagement. 2 Kent's Com. (14th E.), 577; Story on Bailment, Sec. 286, 8th Ed.; Jones on Pledges, Sec. 1 (1883).

"A pledgee is trustee for the debtor." *Kirkpatrick v. Hawk*, 80 Ill. 122.

The pledgee is trustee for the pledgor, first to pay the debt, and second, to pay over the surplus, and he can not so deal with the property as to destroy or even impair its value. 2 Kent's Com. (14th Ed.), 581.

A pledgee of securities held in pledge is a trustee for the owner. *Colebrooke on Coll. Securities*, Sec. 87 (1883).

The pledgee is a trustee for the pledgor. While the property is in the possession of the pledgee, he should treat it as a trust property, and not deal with it so as to impair or destroy its value or incur the loss of it. *Jones on Pledges*, Sec. 405 (1883).

It was the duty of appellee to proceed promptly to collect the pledged note at its maturity, and to use reasonable care and diligence in the proceedings to collect same. A pledgee of negotiable paper is bound to use reasonable diligence in the collection of it. If he neglects to enforce payment he is liable for any loss that might have been prevented by proper diligence in proceedings to collect it. *Jones on Pledges*, Sec. 692 (1883).

Reasonable diligence in enforcing payment is required to preserve the legal validity of the pledge from being impaired, because the pledgee only can do it. *Jones on Pledges*, Sec. 693 (1883).

The contract of pledge carries an implication that the security shall be made effectual to discharge the obligation. *Story on Bailment*, Sec. 311 (8th Ed.).

The holder of collateral securities is bound to employ reasonable care, skill and diligence in regard to them to render them as effectual as possible for the purpose intended, and if they are lost by the negligence of the holder, he must account for their value. *Girard v. Marr*, 46 Penn. St. 507.

A creditor receiving collateral security is bound in enforcing it, to do so with all the care and legal skill necessary to insure a collection of its full value. Negligence or want of such skill amounts to a positive act on the part of

the creditor whereby the value of the collateral has been impaired. *Clopton v. Spratt*, 52 Miss. 261.

Where a creditor receives collateral security, he is liable for same if lost by his negligence or want of ordinary attention and vigilance on his part. *Wood v. Morgan*, 5 Sneed (Tenn.), 79.

A creditor who receives negotiable paper as collateral security is liable for neglect in enforcing same. *Whitten v. Wright*, 34 Mich. 93.

A creditor receiving collateral security is bound to exercise such diligence as a bailee for hire, and is liable for loss arising from his neglect to enforce collection with proper diligence. *Hazard v. Wells*, 2 Abbott N. C. (N. Y.) 444.

"If a party undertaking to do a thing, does it so ill that the other party suffers an injury thereby, the law will allow the injured party to recover compensation to the extent of the injury." *Id.*, Secs. 171 and 171d. He who undertakes the business of another is responsible, whether he is capable or not. *Story on Bailment*, Sec. 9, 8th Ed.

A creditor who fails to use ordinary diligence in collecting collaterals is liable for their loss. *Douglas v. Mundine*, 57 Tex. 347.

A pledgee must use ordinary care and diligence to collect the security; he is liable for loss resulting from neglect. The responsibility is not determined by the strict rules of law applicable to negotiable paper, but rather by the principles of the general law of agency. *Roberts v. Thompson*, 14 Ohio St. 1.

Where a creditor receives a promissory note as collateral security he is bound to due diligence in the collection of the debt, and if anything is lost by want of it he is to be the loser. *Cardin v. Jones*, 23 Ga. 175.

A person who receives notes as collateral security for a debt is bound to use due diligence in collecting same, and if they are lost through his negligence he is chargeable with the amount. *Barrow v. Rhineland*, 3 Johns. Chy. 615.

A pledgee makes the pledge his own by his *laches*. *Dayton v. Trull*, 23 Wend. 345.

Cheney v. Cross.

Where diligence is a duty, it is negligence to omit such duty. It is negligence on the part of a pledgee to testify carelessly and recklessly in a suit based upon a collateral security note held by him in pledge.

It is negligence on the part of a pledgee to omit to use all reasonable means to make such suit successful.

Due diligence means a course of legal proceedings according to the rules and principles established in our systems of jurisprudence for the protection and enforcement of private rights. *Pennoyer v. Neff*, 5 Otto (U. S.), 733.

Due diligence means all ordinary legal measures prosecuted in good faith. *Thomas v. Woods*, 4 Cowen (N. Y.), 182.

Negligence consists in the commission of some lawful act in a careless manner, or in the omission to perform some legal duty to the injury of another. *Nicholson v. Erie*, 41 N. Y. 529.

It is the duty of a pledgee of negotiable paper in prosecuting a suit to enforce collection thereof; to preserve exceptions to errors occurring at the trial; to prepare the way and to pray an appeal, or sue out a writ of error against an adverse judgment. The grossest mismanagement after all is found in the failure to appeal from the judgment itself. It is negligence in an attorney to neglect to prosecute a motion for a new trial. It was inexcusable to permit the time for appeal to pass by. *Drais v. Hogan*, 50 Cal. 121.

An attorney in an action in which an erroneous judgment has been rendered against his client may sue out a writ of error for the reversal of such judgment without special authority, and it is his duty to do so. *Grosvenor v. Danforth*, 16 Mass. 73.

An attorney may recognize and bind his client to prosecute an appeal without further authority. *Adams v. Robinson*, 1 Pick. (Mass.), 461.

The pledgee of commercial paper held in pledge, is a trustee for the owner; he is bound to hold and collect the same as it becomes due, and apply the proceeds to the payment of the debt so secured. *Joliet v. Scioto*, 82 Ill. 549.

The purpose of collateral securities is to place in the hands of the pledgee the means of reimbursement if default occurs. The contract of pledge carries with it the implication that the collateral security shall be made effectual to discharge the debt. Colebrooke on C. S., Sec. 85, 1883 Ed.

It is the duty of the pledgee to proceed by action to collect the whole face value of the security. Colebrooke on C. S., Sec. 90, 1883 Ed.

“Where the pledge is a negotiable security it is the duty of the pledgee to use all due diligence to collect such notes, or he will be liable.” *Hanna v. Holton*, 78 Pa. 334; *Lamberton v. Windom*, 12 Minn. 232; *Story on Bailment*, Secs. 321, 351, 8th Ed.

The diligence required of a pledgee of negotiable paper is the same as that required of an agent or attorney employed to collect the demand. *Jones on Pledges*, Sec. 692; *Buckinham v. Payne*, 36 Barb. (N. Y.) 81; *Godefroy v. Jay*, 7 Bing. (Eng.) 413; *Stevens v. Walker*, 55 Ill. 151; *Walker v. Stevens*, 79 Ill. 193; *Dearborn v. Dearborn*, 15 Mass. 316; *Lawrence v. McCalmont*, 2 How. (U. S.) 427.

A pledgee having received negotiable paper to secure a debt evidenced by a separate note, can not maintain an action to enforce payment of the pledged paper unless he also owns the debt secured by the pledge. The separation of debt and security therefor is contrary to the usual course of business. *Ware v. Russell*, 57 Ala. 43; *Van Eman v. Stanchfield*, 13 Minn. 76; *Waddle v. Owen*, 43 Neb. 489; 61 N. W. Rep. 731; *Ocean Bank v. Fant*, 50 N. Y. 474; *Jones on Pledges*, Sec. 419, 1883 Ed.; *Colebrooke on Coll.*, Sec. 79, 1883 Ed.; *Craig v. Parkis*, 40 N. Y. 181; *Lucas v. Harris*, 20 Ill. 165; *Dicey on Parties*, 499, Rule 114; *Spencer v. Field*, 10 Wend. 93; *Sailly v. Cleveland*, 10 Wend. 159; *Tiedeman on Com. Paper*, 1889 Ed., Sec. 304; *Moore v. Maple*, 25 Ill. 341; *Steere v. Benson*, 2 Ill. App. 560.

A privy to a judgment is a person who subsequently thereto has succeeded to the rights formerly held by another in property affected by the judgment. *Freeman on Judgments*, Secs. 162, 181; 12 Am. & Eng. Ency. 93.

“By privies, within the meaning of the rule, are meant heirs, executors, administrators, terre tenants, or those having an interest in remainder or reversion, or one who is made a party by law.” 7 Ency. of Pl. & Pr., 857. McCormick v. Fulton, 19 Ill. 570; Rorke v. Goldstein, 86 Ill. 568; Northrup v. McGee, 20 Ill. App. 108; 12 Am. & Eng. Ency. of Law, p. 97.

In an action by a creditor to recover upon a debt secured by negotiable paper pledged as collateral, it is incumbent on such creditor to produce such pledged paper at the trial, or show why it is not produced. Funkhouser v. Wagner, 62 Ill. 59.

“Where a pledge is lost or destroyed, it is at an end like any other bailment; but the pledgee can not recover the debt for which it was security, without showing that the loss was not attributable to his fault.” Lawson on Bailment, 1895, Secs. 70, 332; Stearns v. Marsh, 4 Denio (N. Y.), 227.

The law presumes that a negotiable promissory note was founded upon a valid consideration and such presumption can only be overcome by a preponderance of legal evidence. Union Trust Co. v. Rigdon, 93 Ill. 458; Kerney v. Gardner, 27 Ill. 163; Shelden v. Harding, 44 Ill. 71; Thompson v. Shoemaker, 68 Ill. 256; Ruff v. Jarrett, 94 Ill. 475; Miller v. Larned, 103 Ill. 570; Padfield v. Padfield, 68 Ill. 210; Comstock v. Hannah, 76 Ill. 535.

When pledged securities are lost or destroyed while in the possession of the bailee the burden is on him to show the exercise by him of due care and diligence according to the nature of the bailment. Shearman and Redfield on Negligence (1880, 3d Ed.), Sec. 13; Thomas on Negligence, 68; Funkhouser v. Wagner, 62 Ill. 59; Shearman and Redfield (1880), Secs. 220, 245; Ouderkirk v. C. N. Bank, 119 N. Y. 263; Semple v. Detwiler, 30 Kan. 399; Reed v. Darlington, 19 Iowa, 349.

HAMILTON & HAMILTON and GEORGE W. HERDMAN, attorneys for appellee.

The judgment of the Supreme Court of New Jersey, in

the suit of Andrew W. Cross v. The Executors of the Estate of Mary D'Arcy, deceased, upon the \$5,600 note of Mary D'Arcy, is conclusive, not only upon Cross, who was indorsee and plaintiff in the suit, but also upon P. D. Cheney, who was payee and indorser of said note, and who was a privy to said suit. Black on Judgments, Vol. 2, Sec. 506, 829; Shinn, Pleading, Vol. 2, Sec. 987; Arenz v. Reihle, 1 Scam. 340; Horton v. Critchfield, 18 Ill. 133; Baker v. Palmer, 83 Ill. 568; Roth v. Roth, 104 Ill. 35; Leslie v. Bonte, 130 Ill. 501.

There is a privity between Cheney as indorser and Cross as indorsee of the Mary D'Arcy \$5,600 note. Dan. Neg. Ins., Vol. 1, Sec. 174, and note 2 (4th Ed.).

The Mary D'Arcy note of \$5,600, as a cause of action, became and was completely merged in the judgment rendered by the Supreme Court of New Jersey, not only as to Cross, indorsee and plaintiff, but also as to Cheney, payee and indorser thereof, and privy to said judgment, where the issue was want of consideration. Leslie v. Bonte et al., 130 Ill. 501; 2 Black on Judgments, Sec. 555.

Whatever reasonable expense is necessarily incurred by the pledgee in keeping and caring for the property pledged, and protecting it against liens and taxes and assessments, and asserting title to it or rendering it available, is a fair charge against the property. Furness v. Union Nat. Bank, 147 Ill. 575; Furness v. Union Nat. Bank, 46 Ill. App. 525; Farwell v. Johnston, 57 Ill. App. 110.

A reasonable attorney's fee may be allowed. Jones on Pledges, Sec. 680.

Cheney, the appellant, advised, directed and furnished money to pay attorney's fees and costs in the suit on the Mary D'Arcy note in the Supreme Court of New Jersey, and he is bound by the judgment in that suit to the same extent as Cross, appellee, although said Cheney was not a party to the suit of record. 2 Black on Judgments, Secs. 540, 574; Freeman on Judgments, Secs. 187, 188, 174, 175; Bennitt v. Star Mining Co., 119 Ill. 14; Patton v. Smith, 113 Ill. 499; Cheney v. Patton, 134 Ill. 422; Cheney v. Patton, 144 Ill. 373.

Cheney v. Cross.

The suit on the Mary D'Arcy note was rightfully brought in the Supreme Court of New Jersey, in the name of Cross as plaintiff, who had the legal title to said note as indorsee of Cheney, notwithstanding the principal note for which the D'Arcy note was held as collateral, had been assigned to the bank. The executors of Mary D'Arcy, who were defendants in the New Jersey suit, could not contest the right of Cross to maintain said suit as plaintiff. *Caldwell v. Lawrence*, 84 Ill. 161; *Lohman v. Cass County Bank*, 87 Ill. 616; *Rothschild v. Bruschke*, 33 Ill. App. 283; *Forster v. Second National Bank*, 61 Ill. App. 272.

This cause having been tried by the court without a jury, the same force and effect will be given to the finding and judgment of the court as would be given to the verdict of a jury, and judgment thereon. *Clark v. Scanlon*, 33 Ill. App. 48; *Armstrong v. Barrett*, 46 Ill. App. 193; *Walsh v. Dunn*, 34 Ill. App. 152; *Field v. C. & R. I. R. R. Co.*, 71 Ill. 459; *Cribben, Sexton & Co. v. Hicks*, 72 Ill. App. 447.

When substantial justice has been done, the judgment of the court below will be affirmed. *C., C., C. & St. L. Ry. Co. v. Hall*, 72 Ill. App. 448; *New England F. & M. Ins. Co. v. Wetmore*, 32 Ill. 221; *Curtis v. Sage*, 35 Ill. 22; *Beseler v. Stephani*, 71 Ill. 400.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was an action of assumpsit by Andrew Cross as plaintiff, against Prentiss D. Cheney as defendant, commenced and prosecuted to judgment in the Circuit Court of Jersey County. The trial was before the court without a jury, by consent, and resulted in a finding and judgment in favor of the plaintiff for \$7,242.60 and costs. The defendant brings the case to this court by appeal and urges us to reverse the judgment for the following reasons:

(1) The court erred in sustaining plaintiff's demurrer to counts one, two and six of defendant's second amended plea of set-off.

(2) The court erred in overruling defendant's motion for judgment upon the pleadings.

- (3) The finding of the court is against the evidence.
- (4) The judgment is against the law of the case, and
- (5) The damages assessed are excessive.

The declaration sets out in the first count the execution and delivery of a promissory note by the defendant to the plaintiff for \$5,000, dated April 29, 1891, payable July 14, 1891, with interest after maturity at the rate of eight per cent per annum, and if not paid when due, and the note is placed in the hands of an attorney to collect, then to pay ten per cent on the amount due thereon, in addition, as an attorney's fee, to be recovered as part of the note, or by separate suit; a failure to pay the same; and claims damages therefor; and also has added the appropriate common counts.

The defendant pleaded the general issue, and by amendments, what is called in this record the "defendant's second amended special plea of set-off," with six counts, in which the defendant admitted the execution and delivery by him to the plaintiff of the note sued on, and set up as a defense thereto, that the defendant also gave to the plaintiff a note of Mary D'Arcy, which is as follows :

"\$5,600. MORRISTOWN, N. J., May 9th, 1885.

On or before five years after date, for value received, I promise to pay to the order of P. D. Cheney, five thousand six hundred dollars, with six per cent per annum interest from date until paid.

MARY D'ARCY.

Indorsed: Pay to Andrew W. Cross, or order.

P. D. CHENEY."

The same to be held by the plaintiff as a collateral security for the payment of the note sued on, which he calls the "principal note," and avers that the "collateral note" was a valid and binding obligation against the maker thereof; that the maker was solvent and able to pay the same in her lifetime, and when she afterward died, left an estate in New Jersey, where she lived and died, which was amply sufficient to pay said note, but that the plaintiff had negligently failed and refused to collect the collateral note both in the lifetime of the maker and after her death, until the

collection thereof had become barred by the statute of limitations of the State of New Jersey; whereby the collateral note had been wholly lost to the defendant; wherefore an action hath accrued to the defendant, to demand of and from the plaintiff the amount due on the collateral note; and defendant asks that the whole amount due on the collateral note be set off to defendant against the amount due the plaintiff on the principal note sued on.

This special plea of set-off has also added to it appropriate common counts, which would justify the setting off against the amount claimed in the declaration, any demand which the defendant had against the plaintiff when this suit was commenced.

To defendant's plea of set-off the plaintiff replied, by way of replication thereto, that on February 12, 1894, plaintiff being then the legal holder of the Mary D'Arcy note for \$5,600, instituted in his name a suit in the Supreme Court of New Jersey, against the executor of the will of said Mary D'Arcy, as she lived in New Jersey and had died there testate; that the executor, as defendant thereon, filed a plea of the general issue and a plea of the statute of limitations, upon which pleas issue was joined by the plaintiff; that in response to demand of plaintiff's attorney in the New Jersey suit, the executor filed in that court in that suit a specification of the defenses that would be made under said plea of the general issue, which specification was as follows:

First. That the Mary D'Arcy note sued on in that case was founded upon no consideration and was and is not binding upon Mary D'Arcy nor her executors.

Second. That the plaintiff is not a *bona fide* holder of the Mary D'Arcy note for value, and without notice of the want of consideration; and that the plaintiff is not entitled to recover thereon.

Third. That if the plaintiff is entitled to recover any sum of money on the Mary D'Arcy note sued on in that case, he can not recover more than the amount actually advanced by him before the maturity of said note, in good faith, without notice of the want of consideration of said note;

that under the statute of New Jersey, the executor aforesaid, as defendant in said suit, was confined to the defense contained in said specification; that the plaintiff did prosecute the suit in New Jersey, with due care and diligence, so that on May 4, 1897, it came on for trial in said court, before a jury who rendered a verdict in favor of the executor, upon which that court rendered judgment against the plaintiff in bar of the action, and for costs; that the defendant, Cheney, had notice and was advised of the commencement of the suit in New Jersey, and all the proceedings therein; and that there was no negligence or want of care and diligence on the part of the plaintiff in handling said note, or in the institution, prosecution, or trial of the suit in New Jersey, or in permitting the rendition of the judgment therein.

To this replication the defendant filed a rejoinder in which he admitted that the plaintiff commenced the suit on the D'Arcy note against the executor of her estate, in New Jersey, and the same terminated in a verdict and judgment as stated in the replication, but denied that the plaintiff prosecuted the suit with the diligence alleged, but on the contrary he negligently and carelessly conducted himself with reference to the collection of the Mary D'Arcy note, and in the prosecution of the suit thereon; that the verdict and judgment therein was on that account adverse to him; and further denies that he had notice of the suit in New Jersey, and of all the proceedings therein, and advised and directed the plaintiff and his attorney in commencing and conducting same from its commencement until its termination, as alleged in the replication, but says that on the contrary, the plaintiff and his attorney, of their own accord, independent of, and without regard to any advice of the defendant, commenced and managed said suit to its end, with the result stated; and concludes to the country.

Issues were joined upon this rejoinder and on the plea of general issue, and a replication was filed traversing the facts set out in the common counts in the plea of set-off, and issue properly joined thereon.

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On the hearing before the court without a jury, by consent, evidence was heard, from which it appears that by Sec. 116, p. 2552, Gen. Statutes (1895), New Jersey, that the plaintiff had the right to demand of the executor in the suit on the D'Arcy note, to file therein the specification of the defenses he intended to make to the note sued on, under his plea of general issue, and when filed to confine him in such defense to the defenses set forth in such stipulation; and that he did file the stipulation of his defenses therein as averred in plaintiff's replication; that the defendant herein had notice of, advised and directed the plaintiff and his attorney to commence and how to manage the suit in New Jersey from its commencement to its completion; that the suit was commenced February 12, 1894, in the name of the plaintiff after the defendant (Cheney) had given the attorney of Cross the facts as to how Cross was holding the note, and advised it to be so commenced.

And it also shows that the D'Arcy note is dated May 9, 1885, and by its terms was due on May 9, 1890; that the principal note sued on was given April 9, 1891, so that it appears that the D'Arcy collateral note was overdue at the time the principal note sued on in this case was given.

The defendant, Cross, testified as a witness in this suit, that he paid as costs and reasonable attorney's fees in the New Jersey suit, the sum of \$1,050, and that the defendant herein (Cheney) had reimbursed him therefor to the amount of \$750, and that he received back from the clerk of the court in New Jersey, where said suit was tried, \$58.70 of \$100 that he deposited to secure costs therein; and that his expenses in attending as a witness, etc., in that suit, were \$157.10. These amounts with the principal and interest of the note sued on, and the attorney's fees provided therein to be paid in case the note was sued on, foot up the amount of the judgment rendered by the Circuit Court in this case.

While it is true that the defendant (Cheney) in his testimony denied knowledge of the fact that Cross had transferred the D'Arcy note to the Bank, nevertheless, we think that even if he did not know that fact, yet it was fully

established by the evidence that that fact did not defeat a recovery on the D'Arcy note, but such recovery was defeated solely on the ground that there was no consideration given for this note.

We also think, from a fair consideration of all the evidence, that the appellant (Cheney) did so advise, manage and assist in the suit in New Jersey, and his interest was such in the collection of the money due on the D'Arcy note, that he is as completely bound by the result reached in the New Jersey suit, as was the appellee, Cross, and therefore, under the doctrine announced in the case of *Cheney v. Patton*, 144 Ill. 373, and cases therein cited, he is effectually bound thereby.

As to the claims made by counsel for the appellant, that the Circuit Court erred in sustaining plaintiff's demurrer to "counts one, two and six of defendant's second amended plea of set-off;" that the Circuit Court erred in overruling defendant's motion for judgment upon the pleadings; and the finding of that court was against the evidence, we will say that the record discloses that the defendant could and did make all the proofs and defense under his pleadings, which the court sustained, that he could have made if the demurrer had been overruled as to those counts; that as the pleadings stood when his motion for judgment on the pleadings was made, he was not entitled to have it allowed; and the evidence justified the damages assessed.

So that on this record we are unable to find that the Circuit Court committed any of the errors urged by counsel for the appellant, to reverse its judgment, hence we affirm it.

Sarah A. Richardson v. Amelia Richardson, David Richardson and William Shup.

1. FRAUDULENT CONVEYANCES—*When to be Set Aside.*—A conveyance in fraud of the complainant's rights as a creditor will be set aside.

Creditor's Bill.—Trial in the Circuit Court of Cumberland County; the Hon. FRANK K. DUNN, Judge, presiding. Hearing and decree for

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complainants; appeal by defendants. Heard in this court at the November term, 1898. Affirmed in part and reversed in part with directions. Opinion filed February 7, 1899.

JAMES W. & E. C. CRAIG and LEVI N. BREWER, attorneys for appellant.

LYLE DECIUS and W. S. EVERHART, attorneys for appellees.

MR. JUSTICE HARKER delivered the opinion of the court.

Amelia Richardson commenced this suit by filing a creditor's bill in which she showed that on the 1st of February, 1897, the County Court of Cumberland County rendered judgment in her favor against the estate of William Richardson, deceased, for \$808.75, upon a note executed to her by William Richardson on the 30th day of July, 1887; that at the date of the note and afterward he owned and possessed seventy-three and one-half acres of land in Cumberland county, forty-three and one-half acres of which he and his wife, Sarah A. Richardson, on the 14th day of March, 1893, conveyed to David Richardson, in consideration of the payment by David of a mortgaged indebtedness of \$589.75 existing against the land in favor of one Joseph Eskridge, the grantors reserving to themselves the use and control of the land for their natural lives; and the remaining thirty acres of which they, on the same day, conveyed to Ida Ross and Charles B. Ross, in consideration of the grantees supporting them during life; that on the 28th day of November, 1893, Ida and Charles B. Ross conveyed the thirty acres last mentioned to William Shup upon consideration of Shup's promise to support and care for William Richardson and wife; that the appraisers of the estate had allowed to Sarah Richardson, as her award, \$900, and that there were not assets sufficient to satisfy the award and her claim.

The bill sought to have the conveyance named set aside as being in fraud of the complainant's rights as a creditor.

After filing an answer admitting the averments of fact in the bill, David Richardson filed a cross-bill asking that the

release and satisfaction of the mortgage to Joseph Eskridge, which he paid when he took the conveyance from William Richardson, be set aside, the mortgage reinstated, and that he be subrogated to the rights of the mortgagee.

Sarah Richardson answered, denying about all the material averments in the original bill and cross-bill, and set up a right of homestead in the land.

Upon a hearing the court decreed that the deeds from William Richardson and Sarah Richardson to David Richardson and Ida and Charles B. Ross, and the one from Ida and Charles B. Ross to William Shup, be set aside as void against the rights of Amelia Richardson; that David Richardson be subrogated to the rights of a mortgagee under the Eskridge mortgage; that the parties were entitled to liens as follows: First, David Richardson, \$938.17; second, William Shup, \$213.17; third, Amelia Richardson, \$872.25, subject to Sarah Richardson's right of dower; and that in default of payment of the sum mentioned, within sixty days, the land be sold.

The evidence in the record of this case amply supports that part of the decree which declares the conveyance from William Richardson and Sarah Richardson to David Richardson and Ida and Charles B. Ross, and from Ida and Charles B. Ross to William Shup, void as to the rights of Amelia Richardson.

The conveyance left William Richardson in an insolvent condition. Except as to the payment of the Eskridge mortgage, they were voluntary, and for that reason void as to Amelia Richardson, who was then a creditor.

The decree properly restored the lien of the Eskridge mortgage, and subrogated David Richardson to the rights of a mortgagee; because that part of the consideration which related to the payment of the mortgage indebtedness was valid.

It is clear that appellant had a right of homestead, however, as against the claim and right of Amelia Richardson, and the court should have so decreed as she specifically asserted it in her answer.

Richardson v. Richardson.

It is contended that she has a homestead as against the rights of David Richardson, because it nowhere appears in proof that in the mortgage executed by her and her husband to Eskridge, she waived her right of homestead. A complete answer to that contention is that it was admitted upon the trial that the copy of the mortgage attached to the cross-bill was a true copy of the original mortgage from her and her husband to Eskridge, and the copy shows she waived and released all right of homestead in the land.

In the conveyance to David Richardson and Ida and Charles B. Ross, appellant released her right of homestead, and for that reason it is contended she can not assert it against the claim of William Shup. The claim of Shup is for necessities furnished William and Sarah Richardson under the obligation assumed by him when he received his deed from Ida and Charles B. Ross and took possession of the land. He could have no lien, therefore, prior to the right of Amelia Richardson; and if, during the time he was furnishing them, he was enjoying the possession, rents and profits of the land, there should be deducted from his claim the rental value of the land while occupied or controlled by him.

So far as the decree declares void and sets aside the deeds of William and Sarah Richardson to David Richardson and Ida and Charles B. Ross, and the deed from Ida and Charles B. Ross to William Shup, and restores the mortgage given to Eskridge, and subrogates David Richardson to the rights of a mortgagee, it will be affirmed; but in all other respects it will be reversed and the cause remanded, with directions to have homestead set apart to Sarah Richardson, subject to the foreclosure decree of David Richardson, and that Amelia Richardson have lien subject only to rights of David Richardson and homestead estate of Sarah Richardson.

Decree affirmed in part, reversed in part with directions.

**Jacob M. Bell v. Stephen Maddock, L. O. Jenkins and
Jos. Dill.**

1. **PAUPERS—Supervisor Ex Officio Overseer of the Poor.**—Section 18 of Chap. 107, R. S., makes the supervisor *ex officio* overseer of the poor of his township, and section 20 provides that he shall furnish relief and support to them, subject to the restrictions and regulations of the county board.

2. **SAME—Control of, Under the Law.**—Under our present statute, the county board has the exclusive control of contracting for medical service for the paupers of the entire county, and a supervisor can only contract for medical treatment for the paupers of his township, subject to such restrictions as may be prescribed by the county board.

Bill for an Injunction.—Trial in the Circuit Court of Edgar County; the Hon. FRANK K. DUNNE, Judge, presiding. Hearing and decree on demurrer to bill, appeal, etc. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

This is a bill in chancery by appellant to restrain Stephen Maddock, the county clerk of Edgar county, from issuing to Doctors L. O. Jenkins and Joseph Dill an order upon the county treasurer for \$237.50, which had been allowed them by the board of supervisors for medical attendance furnished county paupers.

The bill alleges that on the 26th day of April, 1898, complainant, as supervisor and *ex-officio* overseer of the poor of Paris township, in said county, entered into a written contract with four physicians for medical treatment of the poor of the township for the year commencing May 1, 1898, for \$800; that on the 28th day of April, 1898, a committee of the board of supervisors of the county made a contract with L. O. Jenkins and Joseph Dill, two other physicians, for the treatment of all inmates of the county poor house and the resident paupers of Paris township, for the same year, for \$950, which contract was subsequently ratified by the board; that at its July meeting, 1898, the board allowed Jenkins and Dill the sum of \$247.50, being the amount due them for the first quarter under their contract; that up to

that date Jenkins and Dill had not rendered any attention to the paupers of Paris township, but that such as had been rendered, had been rendered by some of the physicians retained by complainant.

The court sustained a demurrer to the bill and dismissed it.

J. W. HOWELL and FRED E. DOLE, attorneys for appellant.

H. S. TANNER, attorney for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

The only question involved in this controversy is whether the supervisor of a township or the county board of supervisors, in a county under township organization, has control of the employment of physicians to attend sick paupers.

It is provided by statute that every county (except those in which the poor are supported by towns), shall relieve and support the paupers residing therein. It is also provided that the county board shall have power to appoint a physician for them and prescribe his compensation and duties. Secs. 14 and 28, Ch. 107, Rev. Stat., entitled "Paupers." While Sec. 18 of Chap. 107 makes the supervisor *ex officio* overseer of the poor of his township, section 20 provides that he shall furnish relief and support to them, subject to the restrictions and regulations of the county board.

It is plain, then, that under our present statute, the county board has the exclusive control of contracting for medical service for the paupers of the entire county, and that a supervisor can only contract for medical treatment for the paupers of his township subject to such restrictions as may be prescribed by the board. *County of DeWitt v. Wright*, 91 Ill. 529.

Appellant's bill showed no ground for equitable relief. The court properly dismissed it for that reason. Decree affirmed.

80	658
108	497

C. H. Oxman and Clifton Oxman v. L. C. Garwood.

1. **PROMISSORY NOTES—*Liability of Parties Under the Act of 1895.***—The rights of the lawful holders of promissory notes payable in money, and the liability of all the parties upon such notes, are the same as that of like parties to inland bills of exchange, according to the custom of merchants.

2. **SAME—*Liability of Assignors.***—Every assignor of every other note, bond, bill or other instrument in writing made or to be made, by any person, body politic or corporate, whereby such person promises to pay a sum of money or articles of personal property, or any sum of money in personal property, or acknowledges any sum of money or article of personal property to be due to any other person, shall be liable to an action by the assignee or lawful holder thereof, if such assignee or lawful holder shall have used diligence by the institution and prosecution of a suit against the maker thereof, for the recovery of the money or the property due thereon, or damages in lieu thereof.

3. **SAME—*Suit Against the Maker Unavailing.***—But if the institution of such suit would have been unavailing, or the maker absconded or resided without, or left the State when such instrument became due, such assignee or holder may recover of the assignor the same as if due diligence by suit had been used.

4. **PARTIES—*Joinder of All Persons Liable.***—Persons severally liable upon bills of exchange or promissory notes, payable in money, may, all, or any of them severally, be included in the same suit at the option of the plaintiff, and any judgment rendered will be without prejudice to the rights of the several defendants as between themselves.

5. **DILIGENCE—*By Indorsee, of No Concern to the Maker.***—The statute requiring the indorsee of a note to exercise diligence to collect it from the maker before he can compel the indorser (or assignor) to pay it is imposed for the protection of the indorser (or assignor), and it is a matter of no concern to the makers whether the indorsee (or assignee) used the required diligence or not, for the maker's liability to pay the note is not in the least changed or affected thereby.

6. **SAME—*Waiver of, by Indorser.***—If the indorser waives the performance of the required diligence the maker can not complain, because his liability is not thereby increased or in any manner changed.

7. **STATUTES—*Construction of Vested Rights in Remedies.***—In giving construction to the various provisions of the "act to revise the law in relation to promissory notes, due bills, and other instruments in writing, approved March 15, 1874, and to regulate the conduct of suits for enforcing payments of certain negotiable instruments on which parties are jointly and severally liable," (Laws 1895, 262.) courts ought to construe them so as to carry out the express purpose for which it was

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enacted; and with that view in mind, it is but reasonable to hold that the object and purpose of giving the legal holder of bills of exchange and promissory notes, payable in money, the option to include in one suit all or any persons severally liable thereon, was to give him a more speedy, simple and less expensive remedy than he had before, to enforce payment of such negotiable paper.

Assumpsit, on promissory note. Trial in the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Finding and judgment for plaintiff; appeal by defendants. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

GERE & PHILBRICK, attorneys for appellant, contended that the law in this State applicable to indorsers and their liability on promissory notes at the date of this note was, that it was necessary for a holder to proceed, first, against the makers and prosecute them to insolvency, having execution returned *nulla bona*, or be able to show that the suit against said makers would be unavailing.

Neither of these steps were taken, nor was there any attempt to prove any of these steps were taken to create a liability against the indorser, so as to make him jointly liable with the makers of this note. *Nixon v. Weybrich*, 20 Ill. 600; *Finley v. Green*, 85 Ill. 535.

It can not be contended, successfully, that the statute of 1895 was merely remedial, because it entirely changed the rule of law, entirely changed the legal rights of both an indorser and a maker of promissory notes.

The law merchant was not in force in this State until July 1, 1895. Prior to the passage of that act it was a legal duty and obligation, existing under the law, that the maker must first be proceeded against in order to create a liability against an indorser; and even then, the maker could not be sued jointly with an indorser.

This was the law in force and entered into and became a part of the contract made by appellants in the execution of this note. *Andrews & Johnson Co. v. Atwood*, 167 Ill. 249.

The act of 1895, permitting an indorser to be sued jointly

with a maker, and create a liability against the indorser under the law merchant, can be nothing more than an impairment of the obligation of the contract, if it is to be applied to notes executed prior to that time.

“As a general rule, a statute is to operate *in futuro* only, and is not to be so constructed as to effect past transactions. A retrospective effect will not be given it, unless it clearly appears that such was the intention of the legislature, especially where it tends to produce injustice or inconvenience. Such an intention must be manifested by clear and unequivocal expressions. If it is left doubtful what was the real design, the statute must be so constructed as to have a prospective effect only.” *Thompson v. Alexander*, 11 Ill. 55.

The act of April 4, 1872, being the statute of limitation in regard to promissory notes, had no effect upon notes executed prior to the time of its passage, because the courts refused to give it a retroactive effect. *Means v. Harrison*, 114 Ill. 248.

It will be conceded that where a statute merely changes the form of the remedy, it is not giving it a retroactive effect to apply it to actions brought on contracts existing prior to the passage of the act, but it can hardly be contended that this statute of 1895, creating a different liability against an indorser and taking away a substantial right guaranteed to the makers of a note at the time of its execution, can be held to be remedial. *Fisher v. Green*, 142 Ill. 80; *Andrews & Johnson Co. v. Atwood*, 167 Ill. 249; *Woods v. Soucy*, 166 Ill. 407; *Voigt v. Kersten*, 164 Ill. 314.

Even to apply the act of 1895 to this note, and the action herein brought upon this note, it was necessary, not only that the holder of the note present this note for payment on the date of maturity, and that it should have been presented to both of the makers and a refusal by both makers before the indorser should be held liable under the contract of indorsement.

WOLFE & SAVAGE, attorneys for appellee.

The note in question was dated November 3, 1894, and

was due two years after date. The present statute governing the rights of parties to negotiable instruments went into force July 1, 1895. Laws 1895, 262. The makers and indorsers being severally liable upon the note the plaintiff availed himself of the option contained in the act of 1895 to include them in the same suit.

Under the law merchant the indorsement of a note amounts to a contract on the part of an indorser, that if, when duly presented, the note is not paid by the maker the indorser will, upon due and reasonable notice given him of the dishonor, pay to the holder. *Dunnigan v. Stevens*, 122 Ill. 396.

And this he may waive so far as presentment is concerned, but this condition attached to the liability of the indorser may be waived; the statute requiring a prosecution of the maker is for the benefit of the indorser, and he may waive it. The duty of the maker is to pay his note at the time and place when due. *Givens v. Bank*, 85 Ill. 442; *Telford v. Garrells*, 31 Ill. App. 446.

What is due diligence in such case varies with the facts of each case; reasonable promptness, under the circumstances, is all demanded by the rule. *Montelius v. Charles*, 76 Ill. 303.

The statute of 1895 is as follows as to notes payable in money: "The rights of the lawful holder of promissory notes and the liability of all parties to or upon said notes, shall be the same as that of like parties to inland bills of exchange, according to the custom of merchants." Laws of 1895, page 262.

Under this statute all of the citations applicable to actions against makers before fixing liability of indorser are inappropriate when note is payable in money.

Under the statute parties severally liable may be joined in one action, and this is so generally, regardless of the place of residence of either, and it would seem the court in whose jurisdiction either resides may take jurisdiction of all in order to render the statute operative in all cases as a remedial statute, if the plaintiff shall so elect. Laws 1895, Sec. 262.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was an action of assumpsit by the appellee as plaintiff, against the appellants and one John B. Harris, as defendants, commenced August 20, 1897, in the Circuit Court of Champaign County, and resulting in the plaintiff recovering a judgment against all the defendants for \$638.20; from which judgment the appellants alone prosecute the appeal, and urge us to reverse the same on the ground that the court erred in finding from the evidence the facts against them on the issue made by the declaration, plea in abatement to the jurisdiction of the court, replication thereto and issue joined thereon.

The declaration was on a promissory note dated November 3, 1894, payable two years after date to J. B. Harris or order, at his office in the city of Champaign, with seven per cent to be added as damages if not paid at maturity, and reasonable attorney's fees to cover cost of collection; signed by C. H. Oxman, Clifton Oxman, and written on the back thereof, "Pay to the order of L. C. Garwood," signed "J. B. Harris."

To this declaration the defendants, C. H. and Clifton Oxman, interposed a plea in abatement to the jurisdiction of the court, in which they each limit their appearance to the purpose of filing the plea, and then set up in substance that they each were, at the time of the maturity of the note sued on, and from thenceforward have been and now are, residents of the county of White in the State of Illinois; that they each were served with process of this court in this case in the county of White, but neither was served with such process in the county of Champaign; that the only liability of the other defendant, John B. Harris, is that of an indorser of the note, and no suit has ever been instituted or prosecuted against them as makers thereof; that they are now and have been solvent, possessing ample property subject to execution, out of which the payment of the note, ever since its maturity, could have been enforced; that they have resided in Illinois and have had their said

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property in this State ever since the note became due; that the note was not presented to them or either of them, or at the office of J. B. Harris, in Champaign, for payment on the day it became due, and that for the reasons aforesaid there is no liability existing in this action against said John B. Harris as indorser of said note; and that the parties sued in this action are not severally liable on said note, all of which they are each ready to verify; wherefore they pray judgment whether this court will take cognizance, etc.

To which plea the plaintiff interposed a replication in which he in substance says, that the defendants are severally liable on the note; that it was presented to, and the payment thereof demanded of C. H. and Clifton Oxman, on the day when it became due; and that it was also presented to John B. Harris within a reasonable time after it became due and before this suit was commenced, and its payment demanded of him, wherefore he prays, etc., that the same may be inquired of by the country.

The record shows that the parties then agreed to submit the case to the court for trial without a jury, upon the issues joined by the said plea and replication, and the court heard evidence thereon and found against the Oxmans on their plea to the jurisdiction of the court, and ruled them to plead over, which they declined to do, but elected to stand by their plea to the jurisdiction. Thereupon, for want of further plea, the default of the defendants was entered, and by consent of all parties, the court, without a jury, heard the evidence, assessed plaintiffs' damages at \$638.20, and gave judgment therefor against all the defendants.

The evidence showed the execution and delivery of the note sued on and its assignment for value to plaintiff about six months before maturity as charged in the declaration; that when it was made, and ever since that time, the makers (the Oxmans) resided in White county, Illinois, while Harris, the payee and indorser, and the plaintiff, the indorsee, during the same time lived in Champaign, Illinois; that a short time before the note became due the plaintiff, at the

request of Harris, sent it for collection to a bank in Gravelle, White county, Ill., where the Oxmans lived; that the bank sent a notice to the Oxmans by mail, a few days before it became due, to the effect that the bank held the note for collection. On November 4, 1896, C. H. Oxman came to the bank and claimed a part of the consideration of the note had failed and offered to pay a small amount in full payment of it, which offer was refused. On November 4, 1895, the bank returned the note by mail to the plaintiff, who received it next day, and one day thereafter notified Harris that the makers (Oxmans) had not paid it. The makers never left any money at Harris' office in Champaign to pay the note, nor was it ever presented there for payment. The note not being paid by either the makers or the indorser, the plaintiff brought suit upon it against them in Champaign county, as heretofore stated, and the Oxmans were served with process in White county only, and Harris in Champaign county.

The appellee contends that by virtue of the provisions of Secs. 7 and 8, Chap. 98, S. & C. Ill. Stat. (1896), pp. 2796-2801, that Harris as indorser, and the Oxmans as makers, were each severally liable to him on this note, and he had the option to include them all in one suit as he did; and as Harris resided in Champaign county and the Oxmans in White county, he had the right, under section 2 of the practice act, to sue them all in Champaign county, serve Harris there and the Oxmans in White county as he did; and that when Harris made no defense to this action on the note, although his liability thereon was both averred and claimed in the declaration to be that of an indorser of the note, the appellants, being the makers, and liable thereon unconditionally, could not defeat the jurisdiction of the Circuit Court of Champaign County to hear and determine this case by themselves, setting up and proving that Harris, the indorser of the note, was not liable to the plaintiff, his indorsee; for the reason that the plaintiff had not used that diligence to collect the note at its maturity, which the law required, as the requirement was for the benefit of the

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indorser and he could waive it, as Harris had done, by not pleading it; and such waiver did not injure the appellants, as they were liable on the note anyway.

The appellants, however, contend (1) that the provisions of said sections 7 and 8, under which the appellee claims the right to include in one suit Harris the indorser, with them, the makers of the note, did not take effect until July 1, 1895, which being after the note sued on was given, does not make said sections 7 and 8, as amended in 1895, binding upon the appellants in this case; and (2) that if they were binding then by the express provisions of section 7 it was necessary, in order to make Harris liable as indorser, that the appellee as indorsee and holder of the note, had demanded payment of the note from the appellants as makers on the day it became due, and upon their failure or refusal to pay it then, to immediately notify Harris, the indorser, of such demand and failure or refusal, or to show that he had instituted and prosecuted a suit on the note against the makers upon its becoming due, and obtained judgment and execution against them and had the execution returned *nulla bona*, or show that such a suit would have been unavailing, or that the appellants, the makers of the note, had been out of the State of Illinois since the maturity of the note; and as the evidence showed he had not done so, then Harris was shown not to be liable on the note and there could not rightfully be a judgment against him, consequently no judgment ought to have been rendered against any of the defendants.

Said sections 7 and 8, as amended by the amendatory act of 1895, are as follows:

"Sec. 7. That section 7 of 'an act to revise the law in relation to promissory notes, bonds, due bills and other instruments in writing,' approved March 18, 1874, is hereby amended so as to read as follows: The rights of the lawful holders of promissory notes payable in money, and the liability of all the parties to or upon said notes shall be the same as that of like parties to inland bills of exchange according to the custom of merchants. Every assignor of every other note, bond, bill or other instrument in writing

mentioned in section 3 of this act, shall be liable to the action of the assignee or lawful holder thereof, if such assignee or lawful holder shall have used due diligence by the institution and prosecution of a suit against the maker thereof, for the recovery of the money or the property due thereon, or damages in lieu thereof. But if the institution of such suit would have been unavailing, or the maker had absconded, or resided without, or had left the State when such instrument became due, such assignee or holder may recover against the assignor, as if due diligence by suit had been used."

"Sec. 8. Persons severally liable upon bills of exchange or promissory notes, payable in money, may all or any of them severally be included in the same suit at the option of the plaintiff, and judgment rendered in said suit shall be without prejudice to the rights of the several defendants as between themselves."

These sections, as thus amended, went into effect July 1, 1895, and are a part of "an act to amend section 7 of 'an act to revise the laws in relation to promissory notes, bonds, due bills and other instruments in writing,' approved March 18, 1874, and to regulate the conduct of suits for enforcing payments of certain negotiable instruments on which parties are jointly or severally liable." Session Laws 1895, p. 262.

Sec. 7 of the act of 1874, before it was amended, was as follows:

"Every assignor, or his heirs, executors, or administrators, of every such note, bond, bill or other instrument in writing, shall be liable to the action of the assignee thereof, or his executors or administrators, if such assignee shall have used diligence, by the institution and prosecution of a suit against the maker thereof, or against his heirs, executors, or administrators, for the recovery of the money or property due thereon, or damages in lieu thereof; provided, that if the institution of such suit would have been unavailing, or the maker had absconded, or resided without or had left the State, when such instrument became due, such assignee, or his executors or administrators, may recover against the assignor, or against his heirs, executors, or administrators, as if due diligence by suit had been used."

By the express terms of the note sued on in this case, the appellants, as makers, were primarily liable to pay the same

at maturity to Harris, the payee, or to whomsoever he might assign the same; and when Harris, for value, in June or July, 1896, assigned the note to the appellee, he not only thereby transferred the title thereto, but thereby also agreed with the appellee, as his indorsee, that the makers would pay him the note at maturity, and in case they did not, that he (Harris) would pay it, if the appellee would exercise that diligence to collect it from the makers which the law required. And while it is true the act of 1874, both before and as amended in 1895, required the indorsee of such a note as the one sued on in this case to exercise certain diligence to collect the note from the maker before he could make the indorser (or assignor) pay it, yet this requirement was imposed for the benefit and protection of the indorser (or assignor); and it is a matter of no concern to the makers whether the indorsee (or assignee) exercised the required diligence or not, for the reason that the maker's liability to pay the note was not in the least changed or affected thereby. If the indorser waived the performance of the required diligence the maker could not complain on that account, because his liability was not thereby increased or in any manner changed. See *Telford v. Garrells et al.*, 132 Ill. 550, p. 557.

As the evidence showed that Harris, for value, sold and assigned the note to the appellee some five or six months before the note, by its terms, became due, his liability thereon to the appellee is to be measured by the act of 1874, as amended in 1895; and by the express provisions of Sec. 8 thereof, as thus amended, the appellee as indorsee (or assignee) of Harris was given the option to enforce the payment of this note against Harris, the indorser, by including him in the suit with the appellants, the makers, and recover judgment against all in the same suit, the judgment, however, is to be without prejudice to the rights of several defendants as between themselves and as the exercise of this option does in no manner change or effect the liability of the appellants as makers of the note, they can not complain. See *Telford v. Garrells et al.*, *supra*.

But the appellants insist that the effect of allowing the appellee to include Harris as a defendant with them in this suit, and by serving him in Champaign county, where he resides, and serving them in White county, where they reside, and compelling them to litigate their liability on this note in Champaign county, where they neither reside nor were served, is to deprive them of their substantial right to be sued on this note in the county in which they reside or could be found; and as the note was executed in 1894, all their rights and liabilities arising as makers thereof, are to be measured and determined by the law as it was at that time, and not as amended in 1895, without which amendment Harris could not be included with them as defendants in a suit on this note.

We think a complete answer to this contention is that the expressly declared object and purpose of the amendatory act of 1895 is, "to revise the law in relation to promissory notes, due bills and other instruments in writing, 'approved March 15, 1874'; and *to regulate the conduct of suits for enforcing payments of certain negotiable instruments on which parties are jointly and severally liable*;" and in giving construction to the various provisions thereof we ought to construe them so as to carry out the express purpose for which it was enacted; and, with that view in mind, it is but reasonable to hold that the object and purpose of giving the legal holder of bills of exchange and promissory notes, payable in money, the option to include in one suit all or any persons severally liable thereon, was to give him a more speedy, simple and less expensive remedy than he had before, to enforce payment of such negotiable paper. And, since, the appellants, as makers of the notes sued on, had no vested right in the particular remedy, or special mode of enforcing payment thereof against them, as it existed when the note was executed (see *Woods v. Soucy*, 166 Ill. 407; *People ex rel. v. Comrs. of Cook Co.*, 176 Ill. 576, 587; and *Holcomb v. People*, 79 Ill. 409), they have no right to insist that the appellee should be confined in proceeding to enforce payment against them, to pursuing the remedy as it existed, when they executed it.

Middle Division Elevator Co. v. Vandeventer.

Finding that the Circuit Court of Champaign County committed no reversible error in this case, either in its proceedings or in the conclusion reached, we affirm its judgment. Judgment affirmed.

(Justice Wright, having presided in the Circuit Court when this case was tried there, took no part in it, in this court.)

Middle Division Elevator Co. v. Melvin Vandeventer.

1. **CONTRACTS—To Deliver Merchandise—When They May be Abandoned.**—A vendor who contracts to deliver personal property in the future at a certain price, and when the time for delivery arrives is ready and willing to deliver, but is prevented from doing so by the refusal of the vendee to accept, may elect to consider the contract at an end.

2. **AGENT—What is Under the Scope of His Authority.**—An agent placed at an elevator to buy and receive grain, and who contracts for future delivery and attends generally to his principal's business there, has an implied authority to rescind a contract for the delivery of grain.

Assumpsit, to recover damages for failure to deliver corn. Trial in the County Court of DeWitt County; the Hon. GEORGE K. INGHAM, Judge, presiding. Verdict and judgment for defendant: appeal by plaintiff. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

THOMAS F. TIPTON, THOMAS W. TIPTON and CHARLES R. ADAIR, attorneys for appellant.

HERRICK & HERRICK and MOORE, WARNER & LEMON, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

Appellant brought this suit to recover damages for appellee's failure to deliver 4,000 bushels of corn, which he had agreed to deliver at appellant's elevator for twenty-four and one-half cents per bushel. The defense interposed was that after appellee had delivered about three hundred bushels of corn, and had perfected arrangements for shelling

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and delivering the rest, appellant declined to receive more because its elevator was full, and that the contract was thereby abandoned. Upon a trial by the court without a jury the defense prevailed.

Appellee is a farmer, residing five miles from Parnell in DeWitt county. Appellant owns, an elevator at Parnell, operated by one Charles P. Arbogast, as its agent. On the 28th of January, 1898, appellee and Arbogast entered into a contract whereby appellee agreed to deliver 4,000 bushels of corn, then on his place, for twenty-four and one-fourth cents per bushel. Appellee testified that the agreement was that he was to deliver the corn at the elevator as soon as he could shell and haul it; that he procured a large number of teams to haul the corn and did haul about three hundred bushels, when Arbogast declined to receive any more. The condition of the roads became such within a few days that no more corn could be delivered until in the spring.

In the meantime the market price of corn had raised. Appellant then demanded the rest of the 4,000 bushels, which appellee refused upon the ground that the contract had been abandoned. There is no serious conflict in the testimony except as to what occurred between appellee and Arbogast in the early part of February as to further delivery. Whether the contract was abandoned and appellee released from further performance on his part, depends upon what was said by Arbogast on that occasion. As to that there is a sharp conflict between the two. We shall not assume to say that the trial court erred in deciding where the truth was. His opportunities for judging of the credibility of the witnesses were vastly superior to ours.

A vendor who has contracted to deliver personal property in the future at a certain price, and when the time for delivery arrives is ready and willing to deliver and is prevented from doing so by the refusal of the vendee to accept, may elect to consider the contract at an end. *McPherson v. Walker*, 40 Ill. 371; *Kadish et al. v. Young et al.*, 108 Ill. 170; *Roebeling's Sons Co. v. Lock Stitch Fence Co.*, 28 Ill. App. 184.

It is contended that Arbogast had no authority to rescind the contract. His authority, it is claimed, was limited to receiving the corn and paying for it. Such contention can not prevail in the face of the testimony showing that he was placed at the elevator to buy and receive grain; that he contracted for future delivery and attended generally to the corporation's business there. In this case he declined to receive the corn because appellant had not made provision for taking care of it.

In the view which the trial court took of the disputed conversation between appellee and Arbogast no other judgment than that rendered would have been proper. Judgment affirmed.

Chicago & Alton Railroad Company v. Pearl A. Stevens,
Adm'x.

80	671
91	172

1. **RULES—Reasonableness of, Not a Question for the Jury.**—It is not the province of the jury to decide upon the reasonableness of the rules of a railroad company requiring employes to avoid the dangers supposed to be incident to coal chutes, by using the ladders on the opposite side of cars.

2. **ORDINARY CARE—No Recovery Without Exercise of.**—It is sufficient to defeat a recovery if it appears that the deceased failed to use ordinary care to observe the means of safety with which he was provided by the master, and by reason of such failure he was injured.

Trespass on the Case.—Death from negligent act. Trial in the Circuit Court of McLean County; the Hon. JOHN H. MOFFETT, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1898. Reversed and remanded. Opinion filed February 7, 1899.

JOHN E. POLLOCK, attorney for appellant; WILLIAM BROWN, general solicitor.

To warrant recovery for injuries received by a servant from defective appliances, the servant must show the existence of the defect; that the master knew or should have known of its existence, and that the servant did not know

of the defect or have an equal means of knowledge with the master. *C. & A. R. R. Co. v. Scanlan*, 170 Ill. 107.

A servant can not recover from a master for an injury alleged to have been received by reason of the master's failure to employ sufficient help to render the servant's employment reasonably safe where the servant, after discovering the danger, remains in service without objection until he is injured. *Swift & Co. v. Rutkowski*, 167 Ill. 156.

A servant, in order to recover for an injury for defects in the appliances in a business, is required to establish three propositions:

- (1) That the appliances were defective.
- (2) That the master had notice thereof or knowledge, or ought to have had, and
- (3) That the servant did not know of the defect and had not equal means of knowledge with the master. *Goldie v. Werner*, 151 Ill. 551.

KERRICK & BRACKEN, attorneys for appellee.

Knowingly permitting the running board on the coal chute to be in such close proximity to its track as to injure its employe, Stevens, while he was in the discharge of his duties as such employe, and while he was exercising reasonable care for his personal safety, was negligence for which the appellant is liable. *C. & A. R. R. Co. v. Johnson*, 116 Ill. 206; *C. & I. Ry. Co. v. Russell*, Adm'r, 91 Ill. 298; *North Chicago St. R. R. Co. v. Williams*, 140 Ill. 283; *I. & St. L. R. R. Co. v. Whalen*, 19 Ill. App. 116; *Leonard v. Kinnare*, 75 Ill. App. 145; *Christiansen v. Dunham T. and W. Co.*, 75 Ill. App. 267; *Swift & Co. v. Wyatt*, 75 Ill. App. 348; 3 *Elliott on Railroads*, Secs. 1268, 1269; *Hess v. Rosenthal*, 160 Ill. 621; *T. H. & I. Ry. Co. v. Williams*, 172 Ill. 379; *Wood v. L. & N. R. R. Co.*, 88 Fed. Rep. 44; *I. C. R. R. Co. v. Sanders*, 166 Ill. 270.

Proof merely that Stevens knew of the existence of the coal chute is not proof that he knew of its location with reference to the track, and especially is it not proof that he knew of the proximity or even of the existence of the run-

C. & A. R. R. Co. v. Stevens.

ning board, and unless he knew, or by the exercise of ordinary care could have known, of the location of the running board and its exact proximity to passing cars, he is not chargeable with negligence, nor can he be held to have assumed the risk of injury from the running board. *Dorsy v. Phillips & Colby Construction Co.*, 42 Wis. 583; *I. C. R. R. Co. v. Sanders*, 166 Ill. 270; *Ga. Pac. R. R. Co. v. Davis*, 92 Ala. 300; *Johnston v. Oregon S. L. Ry. Co.*, 23 Ore. 94; *Johnston v. St. P. & M. & M. R. R. Co.*, 43 Minn. 53; *Lawless v. Conn. River R. R. Co.*, 136 Mass. 1; *Ferren v. Old Colony R. R. Co.*, 143 Mass. 197; *City of Chicago v. Ridges*, 72 Ill. App. 142; *Wood v. L. & N. R. R. Co.*, 88 Fed. Rep. 44.

MR. JUSTICE WRIGHT delivered the opinion of the court.

This was an action on the case by appellee against appellant for negligently causing the death of her intestate, Guy L. Stevens. The negligence charged in the declaration is in substance that appellant constructed a coal chute dangerously near the railroad track, and that while the deceased, who was in the service of appellant as a brakeman upon a freight train, and while in the discharge of his duty as such, with due care, was struck by a part of the structure of the coal chute and killed. A trial by jury resulted in a verdict and judgment for \$5,000 against appellant from which it has appealed to this court, insisting upon a reversal because the verdict is against the evidence, the court admitted improper evidence, and gave to the jury improper and refused proper instructions. It appears from the evidence that as the freight train in question, upon which the deceased was brakeman, was leaving the station of Tallula, the conductor, while both were yet upon the platform, directed the deceased to deliver a message to the engineer with reference to stopping at the next station, and while attempting to execute this order, the train being then in motion, he was passing down a ladder on the side of one of the cars for the purpose of reaching the engine, and while on the ladder was struck by the running board attached to the coal chute and thereby killed. At the time of entering

the service the deceased was furnished with a rule of the company for which he gave his written receipt, directing him when in the vicinity of coal chutes to use the ladders on the opposite side of train from structure. In the case presented, it is contended the brakeman could not use the ladder on the opposite side of the train and thereby reach the engine while the train was moving, as the ladder on that side of the train was at the further end of the car from the engine. This, however, is answered by the suggestion that there was no such pressing urgency for the execution of the order given to him that prevented the mere momentary delay of passing the coal chute before descending the ladder. Upon the question of due care on the part of the deceased brakeman, with or without the rule, the evidence in the case was close and conflicting, and required accuracy of instructions to the jury upon this point. With or without the rule furnished for the guidance of the employes, it was the duty of the deceased to have used due care to avoid dangers known, or that should, by the exercise of ordinary care, have been known to exist. Except as a mere notice of the dangers attending work in the vicinity of such structures, the rule imposes no greater duty than the law itself, for at all events the brakeman was required to use due care to avoid injury. By the modification of appellant's sixth instruction, the reasonableness of the rule was left to the decision of the jury, and also the ordinary care imposed by the law in the observance of the requirements of the rule by the brakeman was changed to a willful and intentional disobedience of the same, before his conduct in this respect could have the effect to defeat the right of appellee to her action. It was no more the province of the jury to decide the reasonableness of the rule requiring the deceased to avoid the dangers supposed to be incident to structures like this, by using the ladders on the opposite side of the cars from such structures, than it would be for them to decide the reasonableness of the law requiring the exercise of ordinary care to avoid injury in a given case. Treating the rule, which, we think, may be fairly done, as a notice to the

C. & A. R. R. Co. v. Kelly.

deceased that the use of the ladders on the sides of the cars next to the coal chute while in such vicinity was dangerous, then if he failed to use ordinary care to avoid the dangers of which he had notice, and was thereby injured, no recovery could be had for such injury. And in this respect the instruction requiring a willful or intentional disregard of a known danger, before the rights of the brakeman could be affected, was erroneous. To defeat the right of action in the appellee it was legally sufficient if it appeared the deceased had failed to use ordinary care to observe the means of safety with which he was provided by the master, and by reason of such failure he was injured.

For the errors indicated the judgment of the Circuit Court will be reversed and the cause remanded.

Chicago & Alton R. R. Co. v. Katie C. Kelly, Adm'x.

1. VERDICTS—*Of Two Juries—When Conclusive.*—So far as concerns an assignment of error by which the negligence of the defendant is brought in question, and the action of the trial court in refusing a peremptory instruction to find a verdict for the defendant, this court will accept the verdict of two juries, and the former opinion of the court relative to the same question, as conclusive.

2. INSTRUCTIONS—*Two Definitions of Ordinary Care Without Substantial Difference.*—Two definitions of ordinary care, in instructions, by one of which it was defined to be such care as a reasonably prudent person would exercise under the same or like circumstances, and another that it is such care as a reasonably prudent person would exercise under the same or like circumstances while in the exercise of care, and not at a time when such prudent person happened to be careless, are substantially the same as to what in law constitutes ordinary care, except that in the latter instance the instruction assumes that a prudent person would be careless.

3. SAME—*In Estimating Damages—Death From Negligent Act.*—An instruction in which the jury are told that they may, in estimating damages, consider whatever they may believe, from the evidence, that the widow and next of kin might have reasonably expected in a pecuniary way from the continued life of the deceased, is not erroneous. What the widow and next of kin might reasonably expect, amounts to the same as any other reasonable person might reasonably look forward to as something believed to be about to happen or come, and by this test

80	675
182s	267
80	675
189	341
<hr/>	
80	675
190s	1489
190s	4496
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80	675
96	4401
182s	267
<hr/>	
80	675
99	4484

the question was submitted to the jury, as reasonable men, to say from the evidence what such reasonable expectation would be.

4. **NEGLIGENCE—Running a Freight Train at a High Rate of Speed Past a Station.**—Running a freight train at a high rate of speed past a station where a passenger train is receiving and discharging passengers is so plainly negligent as not to require comment; and so it is to so run a freight train just as a passenger train is pulling into a station; more especially so when the track on which the freight train is moving is between the depot and the track on which the passenger train is moving.

5. **SAME—Failure to Look and Listen.**—As a matter of law the failure to look and listen is not necessarily negligence. Such matters are proper for the consideration of the jury in determining whether a person has been negligent, but it can not be said as a matter of law that such failure is negligence.

Action for Personal Injuries.—Trial in the Circuit Court of McLean County: the Hon. COLOSTIN D. MYERS, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

JOHN E. POLLOCK, attorney for appellant; WM. BROWN, general solicitor.

Under the facts in this case "there is no reasonable chance of different reasonable minds reaching different conclusions, and hence the question of contributive negligence becomes a matter of law." *Street Ry. Co. v. Meixner*, 160 Ill. 324; *Wabash Ry. Co. v. Brown*, 152 Ill. 484.

FIFER & BARRY, FRANK GILLESPIE and A. M. CONARD, attorneys for appellee.

It is negligence to run a train between a station and a train opposite it engaged in discharging and receiving passengers, express and mail, it being necessary for passengers and persons whose business it is to receive the express and mail to cross the intervening track. *Tubbs v. Mich. Cen. R. R. Co.*, 64 N. W. Rep. (Mich.) 1061. *Terry v. Jewett*, Rec'r, 78 N. Y. 342.

Running a train at a high rate of speed past a station where another train is waiting to receive passengers is dangerous to persons who may be crossing a track to take the waiting train, and is negligence on the part of the company whose servants are in charge of the moving train. *C., St. P. & K. C. R. R. Co. v. Ryan*, 62 Ill. App. 264.

C. & A. R. R. Co. v. Kelly.

In this State it is not a rule of law that a traveler is bound to stop, look and listen, or to do any or either of these things. C. & N. W. R. R. v. Dunleavy, 129 Ill. 147; T. H. & I. R. R. v. Voelker, 129 Ill. 551; Partlow v. I. C. R. R., 150 Ill. 327; C. & N. W. R. R. v. Hansen, 166 Ill. 623.

MR. JUSTICE WRIGHT delivered the opinion of the court.

Appellee, as the administratrix of George J. Kelly, brought this suit against appellant for negligently causing the death of her intestate. A trial by jury resulted in a verdict and judgment against appellant for \$5,000, from which it appeals to this court, assigning various errors upon the record, by which it seeks a reversal of the judgment. The principal errors urged upon the attention of this court, in the argument of counsel, are (1) that the facts do not warrant a recovery, and that the peremptory instruction to find for appellant, should have been given by the trial court; (2) that improper evidence was admitted by the court, and (3) the court gave improper and refused proper instructions to the jury.

Appellee's intestate, at the time he was killed, was in the employ of the United States as transfer mail clerk at Bloomington, it being his duty to transfer mail to and from the various trains arriving and departing from the Union depot, the railroads intersecting at this point, being two branches of appellant, with double track, the Big Four and Lake Erie and Western. On the night Kelly was killed the regular mail train for St. Louis was due at the station at 1:25 A. M., and upon its arrival upon the east track, a freight train also arrived from the south upon the west track, and the two trains thus came to the station at the same time, the latter at a speed of from ten to twenty-five miles per hour. The depot was situated on the west side of the two tracks, and between the tracks was a small platform where the mail from south-bound trains was usually placed to be taken by the transfer clerk. To reach this platform from the depot it was necessary to cross the west track upon which the freight train

was approaching, and in attempting to do this Kelly was struck by the engine of the freight train and instantly killed.

The case was before us at a former time, and was then reversed and the cause remanded for reasons stated in the opinion of the court, 75 Ill. App. 490. So far as concerns the assignment of error by which the negligence of the appellant is brought in question, and the action of the trial court in refusing the peremptory instruction to find a verdict for appellant, we must accept the verdict of two juries, and our former opinion relative to these questions, as decisive of these points. The facts established by the evidence, relative to the alleged negligence of appellant, by which the death of Kelly was occasioned, are not substantially different in the present record from those appearing in the former. When the case was before us in the first instance we said :

“The running of a freight train at a high rate of speed past a station where a passenger train is receiving and discharging passengers is so plainly negligent as not to require comment. It is equally negligent to so run a freight train just as the passenger train is pulling into the station, and more especially when the track on which the freight train is moving is between the depot and the track on which the passenger train is moving.”

Accepting this quotation from our former opinion as binding authority in this case, upon the point in question, as we think we must, under section 17 of the Appellate Court act, we come to consider the remaining question of fact, presented by the assignment of errors and argument of counsel, whether the deceased was in the exercise of ordinary care for his own safety at the time he received his injuries, whereby his death was occasioned.

To properly determine this question it should be borne in mind that appellee's intestate had been a transfer clerk in the United States mail service, at this junction, for more than a year before his death. It is reasonable to infer, from his length of service, he was acquainted with the rules of appellant in respect to the running of its trains, and that

he would, in the exercise of ordinary care, conform his actions in respect thereto. The following rules were in force at this station at the time of the accident in question:

“Rule 13. Passenger trains standing at stations on double track.—Trains approaching a station where a passenger train may be standing, receiving or discharging passengers, must be stopped before reaching the passenger train, and must not be started before the passenger train moves forward. When two passenger trains, running in opposite directions, arrive at a station on double track, at or about the same time, the train having the right of the road (on single track) will have the right to go to the station platform first, and the other train must stand back until the opposite train has discharged its passengers and departed.

26. The speed of trains must not exceed six (6) miles per hour through incorporated cities and towns on the line.”

If, as contended by counsel for appellant, the deceased was notified that the freight train which killed him was coming, as well as the passenger from which he was to receive mail, he had the right to rely upon appellant complying with its rule in this respect, and relying upon it, he knew that the freight train would be stopped before reaching the passenger train, and that he could with safety do as he did. The freight train was not stopped, as the rule required, resulting in the death of appellee's intestate. We think conclusions like this were fair and reasonable, from all the evidence, and the jury were at liberty to infer ordinary care and diligence on the part of the deceased, from all the circumstances of the case. To hold otherwise would be, in effect, to presume negligence on the part of one in excuse of negligence on the part of another. *Illinois C. R. R. Co. v. Nowicki*, 148 Ill. 29, and cases cited; *Chicago & N. W. R. R. Co. v. Hansen*, 166 Ill. 623.

It is insisted, also, that the court erred in the admission in evidence of the rule of the postoffice department regulating the conduct of clerks in the transfer of mail, which is as follows:

“Transfer clerks are expected to use extraordinary vigilance in guarding the mails under their charge, which must

not be left for a moment exposed, day or night, and especially in making transfers where there is a considerable portage between trains; they should accompany the mails upon the wagon in all cases possible where there is no authorized clerk in charge of the same, and sit in such positions at all times as to be able to instantly detect the loss of a pouch or sack."

It is well known the railroads have contracts with the government with respect to carrying the mails; it is a part of their business as common carriers; they know also the government has in its employ various agents for the purpose of handling and transferring the mails, such as the appellee's intestate, and it should be presumed the employes of appellant were familiar with his duties, and might reasonably be expected to anticipate his presence at the time and place in question, in the regular discharge of his duties. It is not unreasonable also to infer that appellant, being in a sense in the same line of employment with the deceased in handling the mail, was familiar with the rule in question, and was thereby informed of the duties of the deceased, and should have, in the exercise of ordinary foresight, expected his presence at the time and place in question, in discharge of his duties under such rule, and to have regulated their trains with due regard to his safety. Considerations of this kind surely made the rule competent evidence for the consideration of the jury.

It is next insisted that the court, in its instructions to the jury, gave two definitions of ordinary care. One at the request of appellee, by which it is defined to be such care as a reasonably prudent person would exercise under the same or like circumstances, and at the request of appellant that it is such care as a reasonably prudent person would exercise under the same or like circumstances while in the exercise of care, and not at a time when such prudent person happened to be careless. We fail to see any substantial difference in the two statements of that which constitutes ordinary care, except that in the latter instance the instruction assumes that a prudent person would be careless, an infirmity in appellant's own instruction of which it could take no advantage.

It is also complained that the fifth instruction given for appellee, in which the jury are told they may, in estimating damages, consider whatever they may from the evidence believe the widow and next of kin might have reasonably expected in a pecuniary way from the continued life of the intestate. We see no ground for the criticism put upon this instruction. What the widow and next of kin might reasonably expect would be the same as any other reasonable person might reasonably look forward to as something believed to be about to happen or come, and by this test the same question was submitted to the jury, as reasonable men, to say from the evidence what such reasonable expectation would be.

Again it is insisted the court erred in refusing to instruct the jury, at the instance of appellant, that if the deceased did not look to see if the freight train was approaching, and that by reason of his failure to look he was injured, he could not recover.

In the later cases the tendency of the decisions has been to the effect that what is or what is not negligence, is a question of fact for the jury, and it is improper to state such matter in an instruction. *Louisville, N. A. & C. Ry. Co. v. Patchen*, 167 Ill. 204, and cases cited. In *Chicago & N. W. Ry. Co. v. Hansen*, 166 Ill. 623, it is said :

“And formerly this court, in passing upon questions both of law and fact, frequently prescribed that same duty (to look and listen), but it has since been repeatedly held that it can not be said, as a matter of law, that a traveler is bound to look or listen, because there may be various modifying circumstances excusing him from so doing.

It seems to us impossible that there should be a rule of law as to what particular thing a person is bound to do for his protection in the diversity of cases that constantly arise, and the question what a reasonably prudent person would do for his own safety under the circumstances must be left to the jury as one of fact.”

In *Partlow v. Illinois C. R. R. Co.*, 150 Ill. 321, the court say :

“It has often been said by this and other courts that it is the duty of a person approaching a railroad crossing to look

and listen before attempting to cross, and that a person failing to observe this precaution is guilty of negligence; but when the statement has been made, the court, as a general rule, was discussing a question of fact, and in such case the statement may be regarded as accurate. But the court can not say, as a matter of law, that the failure to look and listen is negligence. These facts are proper for the consideration of the jury in determining whether a person has been negligent, but it can not be said as a matter of law that the failure to observe such acts is negligence." Citing *Chicago & N. W. R. R. Co. v. Dunleavy*, 129 Ill. 132; *Terre H. & I. R. R. Co. v. Voelker*, 129 Ill. 540; *Chicago, M. & St. P. Ry. Co. v. Wilson*, 133 Ill. 60.

It follows therefore that the instructions upon this point were properly refused.

Finding no material error in the record, the judgment of the Circuit Court will be affirmed.

Board of Supervisors v. The People ex rel. Commissioners of Highways.

1. **BRIDGES—County Aid in Building.**—Under Section 19 of the act in regard to roads and bridges in counties under township organization, it is not discretionary with the county board to grant or refuse aid when the highway commissioners have done all that the statute requires of them.

2. **SAME—When the Right to Such Aid is Not Waived.**—The right to such aid is not waived by the commissioners entering into the contract for construction of the bridge with a construction company.

3. **SAME—Amount of Aid Entitled.**—The amount of the appropriation to which they are entitled is one-half of the estimated cost, and not one-half of the contract price with the company.

Mandamus.—Trial in the Circuit Court of Moultrie County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Verdict and judgment for relator; appeal by respondents. Heard in this court at the November term, 1898. Affirmed. Opinion filed February 7, 1899.

J. R. & WALTER EDEN, attorneys for appellant, contended that as the evidence shows the bridge has been built, the

Board of Supervisors v. The People.

writ will not issue to compel the county board to take steps preliminary to its being built. The writ will never be ordered in a doubtful case. The court will always refuse to grant it when it is manifest it will be barren and fruitless, or can not have a beneficial effect. *Swigert et al. v. County of Hamilton*, 130 Ill. 538; see 549.

JOHN V. BURNS and FRANK SPITLER, attorneys for appellee, contended that the statute requires the commissioners, when they have determined to ask county aid, to petition the county board, before entering into any contract for work, material or any other expense. It does not require anything more. If they have taken the statutory steps to entitle them to county aid, when they shall have presented the proper petition to the supervisors then the board of supervisors will have "had their day in court." Upon the refusal of the supervisors to do their duty in granting county aid when the statutory showing is made by the petition, the commissioners will be left entirely free to make the necessary contract and to take any proper action to subserve the public interests. R. S., Chap. 121, Sec. 19; *Board of Supervisors v. People ex rel.*, 121 Ill. 616.

They can afterward go into court and by appropriate proceedings compel the payment of the amount for which the county is liable. When the highway commissioners have performed the conditions precedent required by the statute before asking county aid, the board of supervisors have no discretion in the matter, but are required by law to appropriate one-half of the estimated cost of the bridge, or other structure, from the county treasury. *The People v. Board of Supervisors*, 100 Ill. 640; *Board of Supervisors v. People ex rel.*, 118 Ill. 459.

Where their petition presented to the county board shows all the facts required by the statute to entitle the commissioners to county aid, the board of supervisors are required to act, and have no legal right to reject the petition and refuse county aid. *Board of Supervisors v. Town of Condit*, 120 Ill. 301; *Board of Supervisors v. People ex rel.*, 121 Ill. 616.

When the commissioners have presented to a regular meeting of the board of supervisors the requisite petition showing all necessary prior action to have been taken to entitle them to county aid, their right of recovery from the county of one-half of the estimated cost of the bridge then and there accrues. Board of Supervisors v. The People, 116 Ill. 473; Board of Supervisors v. People ex rel., 118 Ill. 459.

MR. JUSTICE WRIGHT delivered the opinion of the court.

This was a petition against appellants for a peremptory writ of mandamus to require it to appropriate from the county treasury a sum sufficient to meet one-half of the expenses of a bridge over the Okaw river, in the town of Sullivan, Moultrie county, on condition that the town asking such aid shall furnish the other half of the required amount, in accordance with the provisions of section 19 of the act in regard to roads and bridges in counties under township organization.

The petition to the county board for aid by the commissioners, under the provisions of the statute to which we have referred, showed all the facts prescribed by law as prerequisite to the right to such aid, but the county board refused to make the appropriation from the county treasury as the law required. After such refusal by the county board the commissioners of highways, October 19, 1895, entered into a contract with the Indiana Bridge Company to build such bridge, and thereafter, November 1, 1895, filed the present petition for mandamus. Appellant answered the petition, in which answer it relied upon the above stated fact, that the contract had been let for the bridge as precluding the right of the commissioners to thereafter require such appropriation. The court overruled a demurrer to the answer, and appellees abiding by their demurrer, judgment followed against them, from which judgment they appealed to this court where the judgment was reversed for reasons stated in the opinion reported in 71 Ill. App. 348, where it was said:

Board of Supervisors v. The People.

“Plaintiffs in error show, by their petition, that they have done all that was required of them by the statute when they applied to the county board for aid. It was not discretionary with the county board to grant or refuse the aid when the highway commissioners had done all that the statute required of them. The right to it accrued to the commissioners when they presented their petition on the 10th of September, 1895, and was not waived by their entering into the contract for construction with the bridge company. The amount of the appropriation to which they are entitled is one-half of the estimated cost, and not one-half of the contract price with the company.”

Since the cause was remanded to the trial court, appellant obtained leave to amend its answer, in which it is alleged concerning the making of the contract with the Indiana Bridge Company as before, with the additional averment that the bridge had been completed by such company and fully paid for by appellees. Replication was filed to the answer denying its averments, and issue being thus formed, a trial by jury resulted in finding that payment for the bridge had not been made in full and that there was still due on the bridge contract \$732.66. After overruling appellant's motion for a new trial the court gave judgment against it, awarding a peremptory writ of mandamus, by which it was required to appropriate \$1,000, or so much thereof as may be necessary to aid in the construction of the bridge and for costs of suit, from which judgment appellant has appealed to this court.

To reverse such judgment it is insisted by counsel for appellant that when the county board refused to grant the appropriation, that it was required of the commissioners if they persisted in their demand for county aid, and before they could be entitled thereto, they should have performed, by themselves, without the co-operation of the supervisors, the provisions of the first and second provisos of the statute, which require all contracts to be made by the commissioners and three members of the board of supervisors, a majority vote of the commissioners and three supervisors being necessary to make any contract or incur any expense, and that all expenditures shall be made by

said commissioners and supervisors, and the county board shall not be liable until all the work had been fully completed and accepted by said commissioners and supervisors and said facts properly certified to by said supervisors and presented to said county board at a meeting held after the completion of the work, which certificate shall contain an itemized account of the expenditures, and then, after the fulfillment of such requirements, should have made a second application to the county board.

We recognize neither force nor merit in this position. The requirement of the statute we have recited from the provisos of the section were intended by the legislature solely for the benefit of the county board, and where, by its own wrongful refusal to make the appropriation in the first instance, it rendered it legally impossible for these requirements to be met as contemplated by the law, it would seem an anomaly, if the party in default should be entitled to assert in a court of justice its own dereliction of duty as a defense, or to cast greater burden upon the person to whom such duty was due. It seems to us clear that the commissioners did all they were required to do. In truth they performed every requirement contained in the provisos, except to certify to the county board the specified facts, and it will be observed, this certificate is required to be made by the supervisors only, an act made impossible by the wrongful act of appellant. The commissioners were entitled to the appropriation when application was made to the county board, as we decided when the case was before us the first time, as may be seen from the quotation above made from our former opinion. By the wrongful refusal of the county board to make such appropriation, the commissioners were forced to the alternative of abandoning the improvement, or constructing it according to the demands of public necessity, as they had already decided. They properly chose the latter, and no just reason is apparent why the county board should not also perform that which the law requires them to do.

The case of *People ex rel. v. Supervisors*, 110 Ill. 93, is

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relied upon by counsel for appellant as an authority to sustain their position. We do not understand that decision in the way it has been urged upon us. The bridge in that case was constructed by the town authorities and paid for out of funds provided by the town before any application was made to the county board for aid, and the court said: "To have rendered the county liable, the commissioners should, on ascertaining the cost of the bridge, have applied to the county board for aid before proceeding to build the bridge. This the statute required." This was what the commissioners did in the case presented, and the liability of the county thereby became fixed.

The judgment of the Circuit Court awarding the peremptory writ of mandamus will be affirmed.

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